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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ALVIN COX,
Petitioner,
v.

STATE OF CALIFORNIA,
Respondent.

**On Petition for Writ of Certiorari
To The Supreme Court of California**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does California violate Petitioner's right to free speech when its Court of Appeal holds that an opinion or a prediction can be the basis for an indictment of fraud or theft by false pretenses?

PARTIES TO THE PROCEEDING

State of California
Alvin Cox

TABLE OF CONTENTS

TABLE OF AUTHORITIES ____________ V

PETITION FOR WRIT OF CERTIORARI ____ 1

OPINIONS BELOW ____________ 1

JURISDICTION ____________ 2

CONSTITUTIONAL AND STATUTORY PROVISIONS ____________ 2

STATEMENT OF THE CASE ____________ 6

Procedural History ____________ 6

REASONS FOR GRANTING THE WRIT ____ 9

CONCLUSION ____________ 23

APPENDIX A - CALIFORNIA SUPREME COURT DECISION ____________ 1A

APPENDIX B - CALIFORNIA APPELLATE COURT DECISION ____________ 2A

APPENDIX C - TRIAL COURT ORDER ____ 55A

APPENDIX D - GRAND JURY INDICTMENT ____________ 58A

TABLE OF AUTHORITIES

Cases

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) 15

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) 18

Buckley v. Valeo, 424 U.S. 1, 41 (1976) 17, 18

City of Chicago v. Morales, 527 U.S. 41, 56 (1999) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 478 (1975) 2

Cummiskey v. Superior Court (1992) 3 Cal.4th 1018, 1026-1027 20

Garrison v. Louisiana, 379 U.S. 64 (1964) 15

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) 15

Gitlow v. New York, 268 U.S. 652, 666 (1925) 2

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) 11

Hill v. Colorado, 530 U.S. 703, 732 (2000) 11

Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610 (1976) 11

Illinois ex rel. Madrigan v. Telemarketing Association, Inc., 548 U.S. 600 (2003) 16

Jackson v. Superior Court, 62 Cal.2d 521, 525 (1965) 20

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) 12

Marks v. United States, 430 U.S. 188, 196 (1977) 11

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 15, 16

NAACP v. Button, 371 U.S. 415, 438 (1963) 17
People v. Backus, 23 Cal.3d 360, 387 (1979) 20
Rabe v. Washington, 405 U.S. 313 (1972) 12
Ryan v. Telemarketing Associates, Inc, 538 U.S. 600 14
Schaumburg v. Citizens For Better Environ., 444 U.S. 620 (1980) 16
Smith v. California, 361 U.S. 147, 151 (1959) 11
Steffel v. Thompson, 415 U.S. 452, 459 (1974) 17
Thompson v. Western States Medical Center, 535 U.S. 357, 152 L.Ed.2d 563, 573 (2002) 15
United States v. Lanier, 520 U.S. 259 (1997) 11
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 (1982) 19
Virginia Slate Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 15
Williams v. Superior Court, 71 Cal.2d 1144, 1147 (1969). 20

Statutes

28 U.S.C. § 1257(a) 2
California Penal Code § 115, subd. (a) 8
California Penal Code § 182 3
California Penal Code § 182(a)(4) 3, 10
California Penal Code § 368(d) 3, 10
California Penal Code § 459 3, 4, 10
California Penal Code § 470, subd. (d) 8
California Penal Code § 487(a) 3, 5, 10
California Penal Code § 939.71 6, 9
California Penal Code § 995 1, 6, 9, 19

California Penal Code § 1238 ________________ 6

Constitutional Provisions
U.S. Const. Amend. I ____________________ 2, 15
U.S. Const. Amend. XIV. § 1 ___________ 2, 11, 12

Books

Heberling, *State Lotteries: Advocating a Social Ill for the Social Good*, THE INDEPENDENT REVIEW, v. VI, no. 4 , 597-606 (Spring 2002). ______________ 14

PETITION FOR WRIT OF CERTIORARI

The petitioner, Justin Cox, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of California's denial of review of a Court of Appeal for the State of California opinion, and order the California Supreme Court grant review and reverse this Court of Appeal opinion, reinstating the dismissal by the Superior Court of California for the County of San Bernardino of seven counts of a grand jury indictment against Petitioner.

OPINIONS BELOW

A San Bernardino County grand jury returned a twenty-seven count indictment against defendants Alvin Cox (Petitioner), John Carr, Randi Fjaeran, and Justin Cox on August 1, 2005, and it is attached as Appendix D. The Superior Court for San Bernardino County granted motions to dismiss, made pursuant to California Penal Code § 995, on twenty-six of the twenty-seven counts against Petitioner. This April 7, 2006 minute order dismissing counts 1, 2, 3, 4, 12, 13, 14, and 23 of the indictment, as well as the other counts, is attached as Appendix C. The November 8, 2007 opinion of the Court of Appeal for the State of California reversing the trial court on these counts is attached as Appendix B (Not Reported in Cal.Rptr.3d, 2007 WL 3299025 (Cal.App. 4 Dist.)). The notation, dated February 13, 2008, denying review in the Supreme Court of California, is attached as Appendix A.

JURISDICTION

This Court has jurisdiction to review the final decision of the California Supreme Court pursuant to 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First and Fourteenth Amendments to the United States Constitution, as well as laws of the State of California.

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting [* * *] abridging the freedom of speech [* * *]." U.S. Const. Amend. I.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. § 1. This has been held to incorporate the prohibition against abridgement of speech to the States. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming that the freedom of speech is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.")

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[1] The final judgment rule is satisfied where the outcome of any remanded proceeding is certain. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1975).

The California laws involved are Penal Code §§ 182(a)(4), 368(d), 459, and 487(a).

Penal Code § 182 provides in pertinent part:

> 182. (a) If two or more persons conspire:
>
> * * *
>
> (4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.
>
> * * * *

Penal Code § 368 provides in pertinent part:

> 368.
>
> * * *
>
> (d) Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable by

imprisonment in a county jail not exceeding one year, or in the state prison for two, three, or four years, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding four hundred dollars ($400); and by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding four hundred dollars ($400).

* * * *

Penal Code § 459 provides:

459. Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle

Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit
larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not
occupied solely because a natural or other disaster caused the occupants to leave the premises.

Penal Code § 487 provides in pertinent part:

487. Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is
of a value exceeding four hundred dollars ($400), except as provided
in subdivision (b).

* * * *

STATEMENT OF THE CASE

Procedural History

On August 1, 2005, a San Bernardino County Court grand jury returned a twenty-seven count indictment against Petitioner, along with three similarly-charged defendants. All defendants filed motions in the Superior Court of San Bernardino to dismiss pursuant to California Penal Code § 995. Petitioner also filed a motion to dismiss under California Penal Code § 939.71 based on failure to disclose known exculpatory evidence to the grand jury. The People filed a joint opposition to all the motions. Petitioner and the other defendants filed replies. Following argument, the superior court indicated an intention to grant the motions to dismiss at the next hearing.

The superior court continued the hearing to allow further briefing on one issue. The People then filed supplemental points and authorities which addressed a different issue. Petitioner and the other defendants filed supplemental points and authorities in response. The superior court then resumed hearing, noting that the supplemental briefing ignored the issue on which leave had been granted and instead addressed issues where leave had not been given. The superior court eventually dismissed all counts except the first.

The People appealed pursuant to California Penal Code §1238. The Court of Appeal for the State of California, Fourth Appellate District, affirmed in part and reversed in part with directions. *The People v. John Carr et al.*, No. E040592 (Cal. Ct. App. 4th November 8, 2007) (*unpublished*). It reversed the superior court and directed that court to enter a new order denying the § 995 motions as to Counts 1, 2, 3, 4, 12, 13, 14, and 23.

Petitioner filed a timely petition for review to the Supreme Court of California on December 13, 2007. The Supreme Court of California summarily denied the petition for review on February 13, 2008.

Factual History

After indictment and the motions to dismiss filed in superior court, a hearing on the motions was held in superior court over three days in February and April 2006. During argument, the People conceded that there was insufficient evidence to support any false representations made to the alleged victims Wallen and Gallagher. After the first two days of argument, the court granted the § 995 motions with respect to the theft and burglary charges. The court indicated that the totality of the circumstances shown by the evidence supported the conclusion that a false representation was made to the victims (other than the Wallens and Gallagher). In essence, the court found that the defendants falsely represented that "there is no chance of getting anything back after the tax sale and the only chance [of getting any money] is to accept their offer right now."

However, the court further found that there was insufficient evidence to support the element of detrimental reliance required for theft by false pretenses. The court explained:

> It seems relatively clear to me that the property owners firmly believed either they had already lost the property and received nothing and were surprised to learn that they in fact had not already lost it, or realized they were about to lose it and firmly believed that they would receive nothing. And that this offer of now receiving something, was basically a gift. And that their decision to sell was based upon their own preexisting erroneous knowledge that they would receive nothing and was not intended or based upon the representations of the defendants.

With respect to the charges of filing a false or forged instrument (§ 115, subd. (a)) and forgery (§ 470, subd. (d)), the court invited further briefing and argument. The supplemental brief filed by the People did not address the charges of filing a false or forged instrument or forgery. Instead, the People addressed the charge of conspiracy to defraud.

When the hearing reconvened, the deputy district attorney explained that the People did not address the charges of filing a false or forged instrument and forgery in their supplemental briefing because these charges are "highly tied to" the theft charges, and that further briefing on those charges was not necessary. Counsel then focused their argument on the conspiracy charge.

The court ultimately denied the § 995 motions as to the conspiracy charge against Petitioner, Carr, and Justin Cox and granted the motions with respect to all other charges. Fjaeran's § 995 motion was granted as to all charges. The court did not rule on Carr's motion to dismiss based upon § 939.71.

After appeal by the People, and briefing from both sides, the California Court of Appeal, Fourth Appellate District, filed an opinion in this case on November 8, 2007. The court, based upon the evidence and construction of the California statutes, reversed the superior court as to counts 1, 2, 3, 4, 12, 13, 14, and 23 of the twenty-seven count indictment. It ruled that there existed probable cause against all four defendants in this case for these counts, as well as implicitly upholding the application of the penal code sections at bar as constitutional.

REASONS FOR GRANTING THE WRIT

The transactions at issue were legal, arms-length transactions. Petitioner offered to purchase lien-encumbered properties headed for tax sale. They reached agreements to purchase these properties before the occurrence of the tax auction. It is undisputed that Petitioner paid the agreed purchase price for each property. The record demonstrates that the selling property owners owed overdue property taxes to the County of San

Bernardino. As such, the County asserted tax liens on their properties and sold them at tax sale auctions. The proceeds from the tax sales were then used to pay the overdue taxes and the costs of the sale.

Owners of property on the date of the tax sale may be entitled to "excess proceeds" from the sale. The excess proceeds are monies left over once all other liens, judgments, title holders, and claims are paid. Petitioner made good-faith, reasonable offers to purchase the encumbered properties from the owners. The record shows that he (Petitioner?) lost his gamble and received no excess proceeds. At no point in the record does the prosecution contend that the purchase of encumbered properties prior to a tax sale is illegal. In fact, alleged victims Guignet, Watts, Sampson, and Guggiana each filed claims for the excess proceeds from the San Bernardino County Tax Collector. The County Tax Collector paid the requested excess proceeds to Guignet and Watts. Petitioner did not file claims for any excess proceeds.

California Penal Code §§ 182(a)(4), 368(d), 459, and 487(a), as construed by the California appellate court, are vague and act to impermissibly chill speech if they permit prosecution based upon this quantum of evidence.

A law can be challenged for vagueness for either two reasons: (1) "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). An enactment being evaluated for vagueness must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited" in order to survive. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Government regulation of speech based upon hearers' reactions to the speech in question must be strictly scrutinized. *See Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-36 (1992) (measures enacted in response to the expected hostility from hearers to a speech's message are not content neutral).

The Fourteenth Amendment requires fair notice of activity that will subject a citizen to criminal prosecution. *See United States v. Lanier,* 520 U.S. 259 (1997). Statutes that have a tendency to inhibit constitutionally protected speech must be closely scrutinized if they potentially inhibit effect on speech, because the free dissemination of ideas may be the loser. *Smith v. California,* 361 U.S. 147, 151 (1959). States must provide fair warning of conduct that will subject the speaker to criminal prosecution. *Marks v. United States,* 430 U.S. 188, 196 (1977); *see also Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. 610 (1976). The sanctions California seeks are criminal penalties; thus, the State must afford Petitioner fair notice of the types of conduct that will be punished.

Petitioner could not have been forewarned that his conduct would subject him to criminal sanctions. Cases which question misrepresentations of value are typically brought as civil actions or determined in the probate courts. Permitting the State to proceed with the underlying action would deprive Petitioner of fundamental due process protections under the Fourteenth Amendment.

Again, "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his conduct to the law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.' " *Id.* at 58 (*quoting Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)); *see also Rabe v. Washington,* 405 U.S. 313 (1972) (conviction under a state obscenity law reversed because it resulted from unforeseeable judicial construction.)

The State of California initially relied on the failure to voluntarily disclose the possibility of excess proceeds as the basis for the fraud prosecution even though the possibility of excess proceeds is far too imprecise a measure by which to determine whether fraud has taken place. A vacant piece of land could easily have $0 in excess proceeds if bidding was essentially dormant during the auction period or the liens exceed the value of the property.

What is the threshold of criminal fraud when any statement of future value can be criminal? No investor would want to purchase a foreclosure property if he could somehow be criminally liable for failing to offer the seller a correct opinion on how much the property would sell for at the courthouse steps. It is the individual seller's perspective that matters, and the trial court found there to be no detrimental reliance.

A foreclosure purchaser, fearing a destructive fraud investigation, would likely be too afraid to even begin to contact property owners. The possibility of facing a fraud investigation for making an estimate on what a property would sell for at auction cannot stand under the First Amendment.[2]

The People's facts and theory do not otherwise present sufficient evidence for a *prima facie* fraud case. First, the sellers were simply not defrauded. The State of California claims this case was founded on the doctrine of consumer fraud, but this reasoning does not withstand close scrutiny because it is unrealistic and irrational to argue that the sellers were defrauded in this case. Both the buyer and the seller got what they wanted. The seller got immediate cash and the buyer received an interest in the property.

In fact it is difficult to understand how the instant case is any more "fraudulent" than a state lottery. Although studies indicate otherwise, the state itself, acting as both regulator and promoter, often tells voters that lottery proceeds will improve school funding or other "public purposes" and occasionally encourages consumers to believe that the chances of winning are greater than they actually are. Despite these "misrepresentations," there is no record of prosecution of State lotteries for fraud. Heberling, *State Lotteries: Advocating a Social Ill for the Social Good,* THE INDEPENDENT REVIEW, v. VI, no. 4, 597-606 (Spring 2002).[3]

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[2] See, for example, statement of Geoffrey W. Peters, House Committee on Oversight and Government Reform Hearings to Assess Veterans' Charities, January 17, 2008.

The State of California seeks a fundamentally new fraud prosecution theory by criminally sanctioning buyers of real property based on a purported false opinion. There are numerous factors affecting the availability of excess proceeds from a tax sale. The factors include liens, loans, taxes, and judgments. Petitioner was operating in good faith and with no intent to defraud. His actions cannot be criminally sanctioned by the State because they were perfectly honest, legal at the time, and only now appear fraudulent by a regulator's hindsight. Because the availability of excess proceeds is unpredictable, buyers cannot be found guilty of any intent to defraud.

It is the settled law of the State of California that a conviction under a prosecution for theft by false pretense consisting of a promise made with no intention of keeping it cannot be sustained by mere proof of the breach of the promise as in a civil case, but that additional evidence of conduct inconsistent with the performance of the promise is required under the due process of the U.S., as well as the California Constitution

This Court has observed that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is inevitable in free debate ... [a]nd punishment of error runs the risk of inducing cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974). Though the First Amendment protections extended to "commercial speech" is governed by a lower standard than noncommercial speech, the former speech is nonetheless protected, as is clearly evidenced by the special four-part test applied to commercial speech. See, e.g., *Thompson v. Western States Medical Center,* 535 U.S. 357, 152 L.Ed.2d 563, 573 (2002).

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[3] *Ryan v. Telemarketing Associates, Inc*, 538 U.S. 600 (2003) (U.S.Amicus.Brief of Brief of Thirty-Two Commercial Fundraisers and Fundraising Consultants as Amici Curiae in Support of Respondents, 2003)

Assuming *arguendo* the statements were made, the State of California's imposition of criminal sanctions for the utterance of truthful statements is improper. In *Virginia Slate Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), this Court held a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773. That, in the alternative, the State of California and specifically the County of San Bernardino, are fearful that the purchase of property prior to tax sales will reduce the enormous income generated to the general fund through excess proceeds, it should not seek this purpose through suppression of otherwise entirely lawful speech.

A government entity violates a person's right to free speech when it criminalizes and prosecutes a person for the conduct of making true statements and statements of opinion. U.S. CONST. amend. I; *see also Milkovich v. Lorain Journal Co.,* 497 U.S. 1

(1990); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Illinois ex rel. Madrigan v. Telemarketing Association, Inc.*, 548 U.S. 600 (2003); *Schaumburg v. Citizens For Better Environ.*, 444 U.S. 620 (1980). An actionable statement can be either express or implied, but it must be one of fact, rather than mere opinion, and it must be capable of being proven either true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Here, the indictment and prosecution of Petitioner is based on his statements in violation of his right to free speech. The People of the State of California and its courts have irrationally characterized several of Petitioner's statements to property sellers as misrepresentations, when they are mere predictions, and charged Petitioner criminally for them. The alleged misrepresentations are statements of opinion and not of fact. They are statements of speculation regarding the potential value of real property, and are thus not actionable.

It is undisputed that Petitioner and defendants paid each seller the agreed upon price for each property acquired. Each of the properties was scheduled to be auctioned at a tax sale. Their value at the sale depended on a variety of speculative factors, including the quantity and value of potential liens each property might carry and the price each property might generate at the tax sale. Communications based on these speculations are opinion and cannot and should not be held out as criminal.

The California Court of Appeal opinion held that proof of a statement that was not definitively shown to be true or false, but if later proven to be true (that no excess proceeds would be available after the tax sale), nonetheless is a basis for the charges of theft by false pretenses. The court cited nothing in support of the proposition, and the concept of a true statement as a basis for criminal liability for making false statements is paradoxical. Accordingly, the charges against Petitioner must be dismissed because they are all based on statements of true fact and/or opinion and thus violate his First Amendment rights.

Petitioner here asserts that the statutes, if they permit indictment based upon the quantum of evidence presented at the grand jury, are unconstitutionally vague, and further asserts that, in this case, the statutes will drive interpretive authority to such a low level of enforcement that arbitrary and discriminatory results will necessarily ensue. That the quantum of evidence here may prove less than that necessary to sustain a conviction is, of course, no defense to the charge that these statutes, as construed by the California courts, impermissibly chill speech. See *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (threat of arrest or prosecution sufficient to chill speech and raise standing).

The vagueness doctrine exists to give notice to the citizenry of prohibited conduct and to supply standards for the law's enforcement. Respecting vagueness challenges to statutes affecting the freedom of speech, this Court has stated that "[t]he test is whether the language of [the law in question] affords the '(p)rescision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" *Buckley v. Valeo*, 424 U.S. 1, 41 (1976) (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)). In *Buckley*, the Court held that the phrase "relative to" in the entire phrase "any expenditure... relative to a clearly identified candidate," was unconstitutionally vague. *Id.* The Court reasoned that whether an expenditure was ultimately "relative to" a clearly identified candidate would vary upon the "understanding of [] hearers and consequently whatever inference may be drawn as to [] intent and meaning." *Id.* at 43. Such a vagary, or a vagueness, would be constitutionally impermissible, so, in *Buckley's* context, in order to save the statutory language in question, the Court construed "relative to" to mean an explicit advocacy for the election or defeat of a clearly identified candidate.[4] *Id.* at 44. That is, the Court narrowed the interpretation in order to save the statute.

The statutory ambiguity in *Buckley* contrasts starkly with the case at bar. Here, the language of the fraud statutes has been unreasonably broadened. Normally, as noted by the California appellate court, under California law only representations of past or present facts are actionable. Yet here the grand jury and the appellate court took a plain understanding of the concept of fraud, one that did not include speculation as to the occurrence of future events, and broadened it to include such predictions. Certainly citizens are impermissibly chilled into silence when they are left with a lack of surety as to meanings in laws affecting speech. *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973) (addressing the overbreadth doctrine).

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[4] The Court ultimately struck down the statute in question on grounds other than vagueness. *Buckley v. Valeo*, 424 U.S. at 44.

The appellate court's holding acts to make California fraud statutes vague and discriminatory in their enforcement. Although the import of a technical understanding of law and terminology is not impermissible when applied to the group targeted for regulation, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982) (words like "roach" and "roach clip" were familiar ones within the sphere being regulated), this is not appropriate in a case such as this, where Petitioner held no "insider" information, nor any access to information not available to the general public.

The California appellate court stated that "evidence of a false representation by Petitioner is minimal,"[5] but stretched to find a possible misrepresentation. "If Justin merely told Watts that he was about to lose the lots at the tax sale and offered to buy them, no false representation occurred." However, "if, [], Justin also said that Watts would not receive any other money from the tax sale, he did make a misrepresentation." It states this, even though this eventuality may in fact materialize.

The appellate court addressed the factual question of the ambiguity of witness testimony by stating "whether he [Justin] crossed the line is unclear from Watts' testimony: maybe Justin said he would receive nothing from the sale, or maybe Watts just assumed it."[6] Yet, regulation based upon hearers' reactions is not permissible. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123.

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[5] page 43.

[6] *Id.*

The appellate court noted that §995 indictments must be set aside, upon the defendant's motion, when the indictment is "without reasonable or probable cause." *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026-1027. It cited *People v. Backus* for the authority that "probable cause is shown if a man of ordinary caution or prudence could entertain a strong suspicion of guilt of the accused." *People v. Backus*, 23 Cal.3d 360, 387 (1979). Importantly, the court stated, "the evidence required to find probable cause need not be sufficient to support a conviction. See *Williams v. Superior Court*, 71 Cal.2d 1144, 1147 (1969). Indictments will not be set aside "if there is some rational ground for assuming the possibility that an offense has been committed and that the accused is guilty of it." *Jackson v. Superior Court*, 62 Cal.2d 521, 525 (1965). Yet the court ignores that the eventuality definitively could occur—that no proceeds may remain after the tax sale—and thus this conclusively answers the question of whether a misrepresentation was made.

The People rely upon the premise that Petitioner "misled" purchasers. The People contend that Petitioner used false statements about the value of the respective properties. The result of these alleged false statements, the prosecution contends, was that sellers parted with their property at an unreasonably low price term.

The record shows the following: 1) sellers were all paid in full for the agreed purchase prices, 2) neither Petitioner nor any other co-indicted defendant ever obtained excess proceeds, 3) no evidence exists that any of the sellers would have obtained excess proceeds if they had not sold the property, 4) no evidence exists that Petitioner made any false statements to the sellers prior to the sales, 5) the sellers did not detrimentally rely on any alleged false statements.

The appellate court explains that it bases its affirmation of the Watts indictment by imputing evidence from other transactions. "Our analysis is guided," the justices write, "by the People's relatively low burden at this stage of the proceedings and the evidence of misrepresentations made by Justin during the other transactions during the same time period." The court merely cites one reason why Watts may have been misled:

> When he started getting ready to leave, Justin told him that they would pay the price previously offered. This suggests that Watts might have negotiated a better deal, or decided to forego a deal at all, if he had not been misled into believing that he would get nothing after the sale.

The court then concludes: "When Watts' uncertain testimony is viewed in the light of these misrepresentations to others made around the same time, a man of ordinary caution or prudence could entertain a strong suspicion that Watts' belief that he would get nothing from the sale was based on misrepresentations asserted by Justin."

Shortly after drawing this conclusion, the appellate court undercuts its own position. The justices agreed that the deed signed by Watts supports Justin's position. The language in the deed reads that Watts "hereby assigns all rights, titles, *and interest in any excess proceeds resulting from the sale* of said property." (emphasis added) This language, the court does note, "tends to undercut the People's case with respect to both the existence of a fraudulent misrepresentation...or reliance." In parenthesis, the court states "Justin would not have made a misrepresentation about the possibility of excess proceeds when the deed itself implies such a possibility" and further states that "Watts could not reasonably have relied upon Justin's oral misrepresentation about getting nothing from the sale when the written document impliedly discloses a right to excess proceeds." Seemingly in contradiction to what it just wrote, the court nonetheless also writes that "although the language on the deed is relevant, it does not necessarily preclude the grand jury's finding of probable cause." No authority is cited in support of this conclusion.

Even given the relatively low standard of evidence needed to sustain the indictment, the court's reliance on evidence outside the immediate transaction was not appropriate. The court cites no authority for the position that evidence from the other transactions could be imputed to the Watts transaction. In fact, authority exists that this imputation was not appropriate. In short, the record shows the transactions were arms-length transactions and no crime was committed. The California Court of Appeal finding of probable cause for these indictment counts was incorrect and the trial court's decision should be reinstated.

CONCLUSION

WHEREFORE, petitioner respectfully prays the Court grant this petition for certiorari to review California's Fourth District Court of Appeal's opinion to reinstate seven counts of a grand jury indictment previously dismissed by the Superior Court of California for the County of San Bernardino.

Respectfully submitted,

ROBERT E. SALYER, ESQ.
1815 Yale Dr.
Louisville, Kentucky 40205
Counsel for Petitioner

APPENDIX A

Alvin Cox,

V.

PEOPLE OF THE STATE OF CALIFORNIA,

Supreme Court Case Number: S159047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, en banc

Order Denying Petitions Filed 2/13/08

GEORGE, CHIEF JUSTICE

The petitions for review [of the Fourth District, Second Division's opinion] are denied.

APPENDIX B

IN THE CASE OF
THE PEOPLE OF THE STATE OF
CALIFORNIA, Appellant

V.

JOHN CARR et al.,
Respondents

No. E040592
(Super.Ct.No. FSB51477

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Unpublished Opinion filed 11/8/07

KING, J., delivered the opinion of the Court, in which Ramirez, PJ., and MILLER, J., joined.

Trial Court Judge: The Honorable Michael A. Smith

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed in part and reversed in part with directions.

Michael A. Ramos, District Attorney, Grover D. Merritt, Lead Deputy District Attorney, and Larry F. Roberts and James R. Secord, Deputy District Attorneys, for Plaintiff and Appellant.

Richard Schwartzberg for Defendant and Respondent Alvin Cox.

Law Offices of C. Bradley Patton and C. Bradley Patton for Defendants and Respondents John Carr and Randi Fjaeran.

Arias & Lockwood and Christopher D. Lockwood for Defendant and Respondent Justin Cox.

I. INTRODUCTION

The San Bernardino County Grand Jury returned a 27-count indictment against defendants John Carr (Carr), Randi Fjaeran (Fjaeran), Alvin Cox (Alvin), and Justin Cox (Justin). The indictment alleges crimes arising from eight different transactions described below. Although the circumstances vary from one transaction to another, they share some essential facts. After the date by which the owner of tax-defaulted property could pay the taxes and avoid sale of the property by the San Bernardino County Tax Collector, one or more of the defendants contacted the property owner. Generally, the owner was told that the property was going to be sold by the tax collector the next day and could no longer be redeemed by paying the taxes. In some instances the owners were told that they would not receive any money from the sale of the property. The owners were not informed of the possibility of recovering proceeds from the tax sale that exceed the amount of taxes and fees due. The owners agreed to sell their property to defendants for a nominal amount, unaware that by doing so the owner would be unable to claim any excess proceeds from the sale.

In most of the transactions, Alvin took title to the property and immediately recorded a deed of trust against the property, purportedly securing obligations owed to Carr or Fjaeran. In some cases, one or more of the defendants bid for the property during the tax sale. This increased bidding activity on the property arguably raised bid prices and, consequently, the amount of excess proceeds recoverable by defendants. In most cases, the property was purchased at the tax sale by unrelated third parties for sums substantially greater than the amount of the taxes and fees owed for the property. These excess proceeds could be claimed by those who held liens against the property, and the owners of the property, as of the date of the tax sale.

In count 1, the People allege that defendants unlawfully conspired "to cheat and defraud owners of real property," including Betty Guignet, Andrew Berman, Kimothy Sampson, Emmet D. Watts, James DeGraffenreid, Carl Wallen, and Shari Guggiana, by false pretenses and false promises. (Pen. Code,

§ 182, subd. (a)(4).)[1] In counts 2 through 27, the People allege crimes committed in furtherance of this conspiracy, including eight counts of grand theft (counts 3, 6, 8, 14, 17, 20, 23, & 26; § 487, subd. (a)), three counts of theft from an elder or dependent adult (counts 2, 13, & 19; § 368, subd. (d)), three counts of burglary (counts 4, 12, & 21; § 459), nine counts of attempting to file a false or forged instrument (counts 5, 7, 11, 15, 16, 18, 22, 25, & 27; § 115, subd. (a)), and three counts of forgery (counts 9, 10, & 24; § 470, subd. (d)). The People further alleged two sentence enhancements: (1) defendants intentionally "took, damaged and destroyed property of a value exceeding $150,000" (§ 12022.6, subd. (b)); and (2) the alleged offenses are related felonies, a material element of which is fraud and embezzlement, involving a pattern of related felony conduct and the taking of more than $500,000 (§ 186.11, subd. (a)).

Defendants moved to dismiss each of the 27 counts pursuant to section 995.[2] Justin also filed a motion to dismiss pursuant to section 939.71.[3] The trial court granted Fjaeran's motion in its entirety. The court granted the section 995 motions by the other defendants as to counts 2 through 27, and denied the motions as to the conspiracy count. The People appealed pursuant to section 1238.[4] We affirm in part and reverse in part with directions.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Section 995 provides that an indictment shall be set aside upon motion by a defendant when "the defendant has been indicted without reasonable or probable cause." (§ 995, subd. (a)(1)(B).)

[3] Section 939.71, subdivision (a), provides: "If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial

II. SUMMARY OF FACTS

A. *San Bernardino 2004 Tax Sales*[5]

When the taxes on real property in San Bernardino County are delinquent for five years, the county places the property for sale by auction. In 2004, the county held two such auctions; the first in May and the second in August. The May 2004 auction occurred between May 17 and May 28. However, the closing date for the auction of particular properties varied. The last date by which taxes could be paid, thereby preventing the auction on a property, was May 14, 2004. The auction is conducted with bidders making bids via the Internet. The owner of the property being sold has no advantage over other bidders in the bidding process. The opening bid for a parcel of property the first time

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prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence."

[4] Justin filed a notice of appeal from the partial denial of his section 995 motion. We issued an order dismissing this appeal on the ground that a defendant may not appeal from an order denying a motion to set aside an information prior to the judgment. (See § 1237; *People v. Izlar* (1908) 8 Cal.App. 600, 602.)

[5] The description of tax sale procedures is based upon the grand jury testimony of a tax sale supervisor with the County of San Bernardino.

it is offered for sale is set at the amount of taxes owed to the county plus the cost of the sale.

If a property did not sell at the May 2004 auction, it was placed for sale at the August 2004 auction. The opening bid for property that is placed for sale a second time is set at an amount the tax collector deems appropriate.

Any proceeds received from the tax sale in excess of the amount due for taxes and costs of sale is referred to as "excess proceeds." The excess proceeds are held for at least 12 months to allow time for people to file a claim to the money. A claimant must have been a "party of interest," such as the property owner or a lien claimant at the time of the sale. The claims of lienholders, including trust deed beneficiaries, have priority over the claims of property owners.

B. *The Guignet-Avery Transaction (Counts 2-5)*

Betty Guignet was 80 years old in 2004. She and her nephew, Fred Avery, owned certain "raw land" in Apple Valley. They paid $75,000 for the property in 1990 or 1991, and Guignet believed it would still be worth that amount. Avery was supposed to pay the taxes for the property, but neglected to do so. The property was put up for sale by the San Bernardino County Tax Collector at the May 2004 auction. Neither Guignet nor Avery received notice of the sale from the tax collector, and they were unaware of the sale.

The opening bid on the Guignet-Avery property was $8,450. The last day for bids was May 21, 2004. By May 19, 2004, the bids on the property had reached $22,200.

In the afternoon of May 19, 2004, Justin called Avery. Justin told him that the Apple Valley property was being sold for taxes the following morning. Justin told Avery that he would "get nothing" from the sale. They could "fight it," he told Avery, but that would be difficult and would require attorneys and money. Justin said he could offer them some money to purchase the property.

Avery and Guignet discussed the call and decided that they either would "be out—like [Justin] said, out everything or take the money that he had offered." Avery called Justin back and told him that they had "no choice," and would accept the offer.

At some time around 9:00 p.m., Alvin came to Avery and Guignet's house, followed by a notary public. Alvin told them that the land was being sold the next day and "it was doubtful if we would get anything from it." He said he was doing this to help out his son.

Alvin presented the two with a prepared grant deed, naming A. E. Cox as grantee. Alvin told Guignet that if they accepted the offer, "we would have $2[,]500 where we wouldn't have nothing [*sic*] if we . . . didn't sign the deed over to him." Avery and Guignet signed the deed. Alvin gave them $2,500; $1,000 in $100 bills, and a check for $1,500.

Guignet testified that she agreed to the deal because she "was in a state of shock." "[T]hey convinced us that [$2,500] is all we were going to get, that we probably wouldn't get anything." Avery said that he agreed "because according to [Justin] we would get nothing." Neither of them were aware of excess proceeds at that time, and they were not told that the owner of the property could receive excess proceeds. Both testified that they would not have agreed to the deal if they had known about excess proceeds.

On the afternoon of May 21, 2004—the day after Guignet and Avery deeded the property to Alvin—Back Bays Trust, a trust created by and for the benefit of Alvin and Nancy Cox, bid on the Guignet-Avery property. A third party was also bidding on the property. Back Bays Trust was the winning bidder, with a bid of $75,200. The excess proceeds for that property was $66,872.20.

Four days after the auction, on May 25, 2004, a deed of trust was recorded against the property. The deed of trust was made by A. E. Cox (as trustor) and Carr (as beneficiary), purportedly to secure a $65,000 debt. The deed of trust recites that it was made on May 14, 2004—five days before Guignet and Avery signed the grant deed. The notary's acknowledgement of A. E. Cox's signature is dated May 25, 2004.

The alleged crimes arising from the transaction with Guignet and Avery are theft from an elder (count 2, § 368, subd. (d)), grand theft (count 3, § 487, subd. (a)), burglary (count 4, § 459), and attempt to file a false or forged instrument (count 5, § 115, subd. (a)).

C. *The Berman Transaction (Counts 6 & 7)*

Andrew and Hope Berman owned certain property in Devore. They had never seen the property. Mr. Berman knew that taxes on the property were unpaid and that there were liens against the property for weed abatement and fire control. He had no use for the property, and had been advised by counsel to not pay the liens and delinquent taxes because "the county will repossess it and they will take care of everything." He had "no idea" what the property was worth.

The opening bid on the Bermans' property was $4,150. By May 19, 2004, the bid reached $30,100. That day, Justin called the Bermans. According to Mr. Berman, Justin said, "We want to buy this property today. Tomorrow it goes into foreclosure. It will be too late, and you'll get no money from it and that would be it." Mr. Berman agreed to meet with Justin's father that evening. Mr. Berman testified that he agreed to meet with him because he "wanted to get rid of the property. There had been a lien on the property for weed abatement, fire control, and I had no use for this property."

The Bermans met with Alvin in the driveway of the Bermans' residence at approximately dinnertime. A notary was present. Alvin told the Bermans that his son could not afford a house and was going to get a trailer and live on the property. Mrs. Berman asked if they could come back later, but Alvin said that it needed to be done right then. He told Mrs. Berman that the property had no value, and that he was doing them a favor by giving them $750 to get it taken care of.

The Bermans did not know about excess proceeds, and Alvin said nothing about it. Mrs. Berman testified that knowledge of excess proceeds would have been important to her in deciding whether to accept Alvin's offer. Mr. Berman stated that he "would have gone through that process" if he knew the property was worth more.

Alvin gave the Bermans a check for $750, and the Bermans signed a quitclaim deed naming A. E. Cox as grantee. A notary was present and acknowledged the signatures. The transaction took about 15 minutes.

Mr. Berman testified that he did not check on the validity of Alvin's claim because: "I have a lot of other things going on in my life. This was something that I just thought was a black hole, a drain. [¶] . . . [¶] . . . there were fire abatement, there were other taxes. I didn't even want this property. So I was quite happy to get it off my hands."

On the same date the Bermans signed the quitclaim deed to Alvin, Alvin gave a deed of trust on the property to Carr to secure a purported obligation of $60,000.

None of the defendants bid on the property. It sold at the May 2004 auction for $38,000. The excess proceeds for the property were $33,972.03.

The alleged crimes arising from the transaction with the Bermans are grand theft (count 6, § 487, subd. (a)) and attempt to file a false or forged instrument (count 7, § 115, subd. (a)).

D. *The Sampson Transaction (Counts 8-12)*

Kimothy Sampson owned a "bare lot" in Apple Valley. An auction for the property by the San Bernardino County Tax Collector took place in May 2004. Although the tax collector sent her notice of the sale, she did not receive it.

The opening bid for Sampson's property was $15,200. By May 19, 2004, the bid for the property reached $25,100. That day, Justin talked with Sampson by telephone. Justin said he represented John Carr. Justin told her that the property was being sold, that she had "lost it," and that John Carr wanted to bid on the property. Sampson was not surprised to hear that she had lost the property because she believed that "the county took it back" due to unpaid taxes some time previously.

The following day, at approximately 3:00 in the afternoon, Carr met Sampson at her house and went inside. Carr told Sampson that she had lost the property and that he wanted to purchase the property from Sampson because it would make him "the first bidder" at the sale, and "give him the first option to purchase the property when it went up for sale." He also mentioned building a house on the property for his mother. Carr offered Sampson $7,000. He insisted that the sale occur that day because he needed to get to the recorder's office that afternoon. Sampson had no knowledge of excess proceeds, and Carr did not tell her about it.

Carr presented Sampson with a document that, according to Sampson, had the word "quitclaim" on it. "The rest of it," she said, "was blank." Carr subsequently told an investigating police officer that the document was a grant deed. Sampson told Carr: "I will sign this to you. If you want to buy the property, that's fine since it doesn't belong to me anymore." Her name was not typed on the document. The name of the grantee was not on the document. Carr told her to sign her name and write her driver's license number on the document, and said the rest would be filled in later. Sampson did so. A notary was not present when she signed it. Carr gave Sampson $7,000 in $100 bills.

After leaving Sampson's house, Carr went to the office of a realty company and instructed a notary to notarize the deed. Carr then presented the deed to the recorder's office that afternoon for filing. The recorded grant deed states that the property is granted to Fjacran. Sampson testified that the recorded grant deed is not the document that she signed. Sampson's name, as the grantor, is typed, as is Fjaeran's name. The notary whose name and stamp appears on the document testified that she had never met Sampson, did not notarize the grant deed, and did not authorize anyone to use her notary stamp.

After 10:00 a.m. on May 21, 2004, two bidders continued to bid on the property: Fjaeran and Sean Moran. Fjaeran, who by this time appeared to hold title to the property pursuant to the grant deed recorded the day before, bid $51,500. Moran and Fjaeran then made numerous bids for the property, each outbidding the other. Eventually, Moran bid $81,000 and Fjaeran did not make a higher bid. Moran, the highest bidder, paid the winning bid amount. The excess proceeds on the property were approximately $65,000.

The alleged crimes arising from the transaction with Sampson are grand theft (count 8, § 487, subd. (a)), two counts of forgery (the grant deed and the notary acknowledgement) (counts 9 & 10, § 470, subd. (d)), attempt to file a false or forged instrument (count 11, § 115, subd. (a)), and burglary (count 12, § 459).

E. *The Watts Transaction (Counts 13-16)*

In May 2004, 81-year-old Emmet Watts owned eight vacant lots that were scheduled for sale by the San Bernardino County Tax Collector.[6] Although he did not receive notice of the auction, he was aware that the taxes on the property were delinquent and that they would go to sale.

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[6] Defendants asserts that the deputy district attorney failed to present exculpatory evidence showing that Watts did not own the subject properties in May 2004. The evidence consists of a default judgment of foreclosure and order of sale by court, filed in the San Bernardino County Superior Court, and certain documents supporting a claim for proceeds submitted by the County of San Bernardino. Although the default judgment orders the specified properties sold, they do not constitute

Justin called Watts and told him that that he could get Watts $1,500 or $2,000 per lot before he lost the properties at auction. Based on his conversation with Justin, Watts understood that he would either get money from Justin for the properties or, if the properties were sold at the tax auction, he would get nothing. A day or two after this conversation, Justin called again and told Watts he had to reduce his offer to a total of $12,000 for the eight lots. Another day or two later, Justin told him his offer had to be reduced to $10,000. Watts agreed to meet with Justin.

Watts met with Justin and Alvin at the Coxes' house on May 20, 2004. A notary was present. After some discussion about the price, Justin agreed to pay $10,000 for the eight lots. Watts agreed to the deal because he needed the money. He was not aware of the right to claim excess proceeds from the sale.

Watts signed a grant deed transferring the properties to A. E. Cox. The deed states that Watts "hereby assigns all rights, titles and interest in any excess proceeds resulting from the sale of said

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evidence that the properties were actually sold or that Watts did not hold title to the properties at the time he transferred title to Alvin. The County of San Bernardino's claim for excess proceeds refers to the *initiation* of judicial foreclosure proceedings on the Watts properties, but does not indicate that the foreclosure sale ever occurred or that Watts was ever divested of title to the properties. Because the documents do not tend to prove that Watts did not have title to the properties in May 2004, they are irrelevant and need not have been introduced in the grand jury proceedings.

property." Watts did not read this part of the document.

The deed was recorded on May 24, 2004. Immediately afterward, a deed of trust against Watts's eight properties, made by A. E. Cox (as trustor) for Fjaeran (as beneficiary), purporting to secure a debt of $140,000, was recorded.

The next day, another deed of trust against Watts's eight properties was recorded. A. E. Cox is the trustor and John A. Carr is the beneficiary. The deed of trust purports to secure an obligation of $60,000.

On May 25, 2004, the same day the second deed of trust was recorded, four of Watts's eight properties sold at the tax auction. None of the defendants were bidders at the sale. The four properties were sold for bids of $25,300, $27,100, $24,200, and $29,410. These sales produced excess proceeds of $10,344.21, $14,945.60, $12,635.60, and $9,741.49.

The alleged crimes arising from the Watts transaction are theft from elder or dependent adult (count 13, § 368, subd. (d)), grand theft (count 14, § 487, subd. (a)), and two counts of attempt to file a false or forged instrument (counts 15 & 16, § 115, subd. (a)).

F. *The DeGraffenreid Transaction (Counts 17 & 18)*

James DeGraffenreid owned certain commercial property in Chino. He had received notice of the county tax sale of the property and was aware of the sale.

On May 24, 2004, Justin called him and offered to buy the property. He said he was buying the property for Carr. DeGraffenreid agreed because he was going to let it go for nothing at the sale. The two met and Justin gave him $5,000 cash and promised to give him $20,000 "if he got the property at a reasonable price." Justin said he needed to record the deed before the auction the next day. DeGraffenreid signed what he described as a "quick claim deed" before a notary in a UPS store.

When asked in the grand jury proceedings whether Justin told him that he would not get anything if he didn't take his offer, DeGraffenreid said, "No." Later, however, when asked if Justin told him what would happen to his property if he did not take the money, DeGraffenreid testified that Justin said, "I wouldn't get anything."

On May 25, 2004, a grant deed was recorded in the San Bernardino County Recorder's Office that appears to be signed by DeGraffenreid. The deed states that "the undersigned hereby assigns all rights, titles and interest in any excess proceeds resulting from the sale of said property." DeGraffenreid told the grand jury that the recorded grant deed is not the document he signed.

On the same day the grant deed was recorded, a deed of trust against the property was recorded. The deed of trust was made by A. E. Cox to John Carr, as beneficiary, and secured an obligation of $600,000.

DeGraffenreid did not know about excess proceeds at the time he signed the deed and Justin did not tell him about it. He told the grand jury that this information "would have mattered," and, "I would have figured that probably the property is worth more than what I let him have it for."

The winning bidder for the DeGraffenried property at the May 2004 sale did not pay the purchase price. Therefore, the property was auctioned again at a sale in August 2004. Both Carr and Fjaeran bid on the property. At that sale, Carr made the highest bid of $255,800. He did not, however, pay the bid price and did not acquire title to the property.

The alleged crimes arising from the transaction with DeGraffenreid are grand theft (count 17, § 487, subd. (a)) and attempt to file a false or forged instrument (count 18, § 115, subd. (a)).

G. *The Wallen Transaction (Counts 19-22)*

In May 2004, Carl and Hope Wallen owned a two-foot wide strip of land in Ontario. Mr. Wallen did not know that he owned the land, believing that it had been sold at an earlier tax sale. He did not receive notice of the May 2004 sale. Mr. Wallen was approximately 70 years old at that time.

On May 20, 2004, Mr. Wallen received a call from a man he identified as Jason Cox. The caller said his father was Alvin Cox and asked Mr. Wallen if he would be interested in selling the subject property. Mr. Wallen told the caller that he did not believe he owned that property. The caller told Mr. Wallen that the property was in his name and was to be sold at a tax sale. The caller made an offer for the property.

At 6:30 or 7:00 that night, Alvin arrived at the Wallens' house with a notary and a grant deed. Alvin told Mr. Wallen that the property was to be sold at a tax sale on the Internet. Alvin said that he worked for "a very wealthy fellow that's buying real estate" and he was investing for him. The Wallens did not know at this time about excess proceeds and Alvin did not tell them. They agreed to sell the property for $500 cash, an amount that seemed "[m]ighty fair" to Mr. Wallen. Mr. and Mrs. Wallen signed the grant deed. The deed states that "[t]he undersigned hereby assigns all rights, titles and interest in any excess proceeds resulting from the sale of said property."

Mr. Wallen testified that if he had known about the right to excess proceeds and that the property may have sold for more than what was owed, he would not have sold it for $500. When Mrs. Wallen was asked whether such knowledge would have mattered to her in the sale, she said it would have because she "would have preferred more."

On May 28, 2004, Alvin gave a deed of trust on the property to Carr, securing an obligation of $17,000.

None of the defendants bid on the property. The property sold for $15,100. It produced $4,325.56 in excess proceeds.

The alleged crimes arising from the Wallen transaction are theft from elder or dependent adult (count 19, § 368, subd. (d)), grand theft (count 20, § 487, subd. (a)), burglary (count 21, § 459), and attempt to file a false or forged instrument (count 22, § 115, subd. (a)).

H. *The Guggiana Transaction (Counts 23-25)*

Shari Guggiana owned certain property in Victorville that was the subject of the May 2004 auction. The property did not sell at the May auction and was put up for sale at the August 2004 auction.

Bidding on the property began at $100. By 7:00 p.m. on August 4, 2004, with two days left in the auction, the bids had exceeded $9,000.

At approximately 8:00 in the evening on August 4 or 5, 2004, a man with a "J name" called Mrs. Guggiana and said her Victorville property was up for auction and that he was interested in buying it. Mrs. Guggiana told the caller to talk to her husband. The caller told Mr. Guggiana that "they" were land speculators, the property was going to be sold for taxes the next day, they did not want to get into a bidding war over the property, and they would like to buy the property so they would have more control at the auction. Mr. Guggiana told the caller, "Well, if it's going to be a bidding war, that's fine with me. . . . [W]e will just get that much more from the sale." The caller responded, "No. It doesn't work that way. All proceeds above the price of the . . . taxes that are due and the fees and assessments go straight to the state. You will not receive anything." Mr. Guggiana then said, "Are you sure of that? That doesn't sound right." The caller explained: "No, because you passed your date to file to stop the proceedings. If you had contacted them prior to the date that they had given you, . . . you could have got something. But now that you passed it, you lose everything. So probably be best to get something out of it than nothing at all."

Mr. Guggiana told the grand jury that although he thought that excess proceeds would go to the title holder, he believed the caller because he "seemed knowledgeable" and "more informed than I was." The caller offered $1,500.

Mrs. Guggiana told the grand jury that there was no time to check out the caller's story because the auction was the next day. Mr. and Mrs. Guggiana talked it over and decided to accept the offer because, Mr. Guggiana explained, "better something than nothing."

Knowledge of the right to excess proceeds would have made a difference to Mrs. Guggiana because "the property could have been more valuable." She explained to the grand jury: "If I had known that it probably was a lot more valuable, that would have been a different situation. But I was under the impression there was nothing more that we could do . . . ." Mr. Guggiana testified that he would not have accepted the caller's offer if he had known that his wife was entitled to excess proceeds because he was sure the property was worth more than $1,500.

According to Mr. Guggiana, a courier arrived at their house one or two hours after the telephone call. Mrs. Guggiana thought the courier came to the house the day after the call. The courier brought with him an envelope with fifteen $100 bills. Mrs. Guggiana thought she signed a receipt for the money; Mr. Guggiana said the document was a grant deed. A notary did not come to the house.[7]

A grant deed was recorded in San Bernardino reflecting the transfer of the property from Shari Guggiana to Alvin E. Cox. The deed is dated August 5, 2004. What appears to be Shari Guggiana's signature is written on the document. The signature is acknowledged by a notary public. When Mrs. Guggiana was shown a copy of the grant deed, she said that the signature on the document is different from her signature and that she did not think that she signed that grant deed. Mr. Guggiana testified that the recorded grant deed looks like what Mrs. Guggiana signed, but that he did not think the signature on the document was her signature.

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[7] Vanessa Rodriguez, the notary who purportedly acknowledged Mrs. Guggiana's signature on the recorded grant deed, testified before the grand jury. Rodriguez said that she notarized Mrs. Guggiana's signature on a grant deed and an affidavit on August 5, 2004, at 1:00 in the afternoon. She stated that that she saw Mrs. Guggiana sign her name on the document.

The property was sold on August 6, 2004, for $39,100. None of the defendants bid on the property. The excess proceeds on the sale were $30,992.61.

The alleged crimes arising from the Guggiana transaction are grand theft (count 23, § 487, subd. (a)), forgery (count 24, § 470, subd. (d)), and attempt to file a false or forged instrument (count 25, § 115, subd. (a)).

I. *The Gallagher Transaction (Counts 26 & 27)*

Daniel Gallagher and his mother owned 30 acres of property in Pinion Hills in 2004.[8] He was aware that the property was tax delinquent and was to be sold by auction. He contacted someone with the County of San Bernardino Tax Collector's Office. He was told that his right to pay the tax lien had expired, and that all he could do at that point was become a bidder on the property.

After learning that his right to pay the taxes had expired, Justin called him. Justin asked him if he would be interested in selling the property. Justin told him that "they" wanted to bid on the property, and that if they had the deed, they could "reclaim the property right then." Otherwise, they would have "to wait one year for the county to clear it."

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[8] Defendants asserts that the deputy district attorney failed to present exculpatory evidence showing that Gallagher did not own the subject property in May 2004. The evidence consists of a default judgment of foreclosure and order of sale by court, filed in the San Bernardino County Superior Court. Like the similarly described document regarding the Watts properties (see fn. 6, *ante*), this document is not evidence that Gallagher or his mother were ever divested of title to the property.

On May 20, 2004, Alvin met with Gallagher. Alvin told Gallagher that he had no idea why his son, Justin, wanted the property. After some negotiations, they agreed upon $2,500—$2,000 cash and a $500 check. Alvin, Gallagher, and Gallagher's wife then walked to a Mailboxes, Etc. store, where Gallagher and his wife signed a grant deed to A. E. Cox in the presence of a notary public. Gallagher also signed his mother's name, purportedly pursuant to a power of attorney.

Gallagher said he agreed to the deal because he "had no intentions of clearing up . . . the $94,000 . . . water bond lien that was against it from San Bernardino County, let alone the $87,000 that was owed against it in back taxes."

Neither Justin nor Alvin mentioned the right to excess proceeds or Gallagher's rights concerning the property. If they had, Gallagher would not have agreed to the deal.

On May 20, 2004, the same day that Alvin received the deed from the Gallaghers, Alvin gave Carr a deed of trust against the property to secure a purported debt of $65,000. This deed of trust was recorded on May 24, 2004.

The Gallagher property auction closed on May 28, 2004. After the deed and deed of trust were recorded, and shortly before the last bids on the property were received, Carr bid on the property. A third party was the successful bidder at $400,200. There were $312,290.61 in excess proceeds.

The alleged crimes arising from the Gallagher transaction are grand theft (count 26, § 487, subd.

(a)) and attempt to file a false or forged instrument (count 27, § 115, subd. (a)).

J. *Investigation*

In connection with the investigation of the defendants, police searched a business address for the "Cox Company" in Santa Ana in March 2005. Among the documents found during that search was a handwritten agreement signed by John Carr and Alvin Cox that appears to create a real estate investment partnership. Among the activities of the partnership is investment in "tax sales."

Police also searched Fjaeran and Carr's residence in Carlsbad.[9] Fjaeran and Carr were home at the time. Carr told the officer that he had been buying tax delinquent properties for more than 20 years, including properties in San Bernardino County. He had borrowed money from Fjaeran to buy the properties. When asked whether Fjaeran had bought property at tax sales, Carr said that he had bought the Sampson property for Fjaeran for $7,000. He admitted that a notary was not present when Sampson signed the deed and that he subsequently instructed a notary to notarize the deed.

The officer asked Carr about some of the alleged victims in this case. Carr recognized Guignet's name, but told the police officer that he could not remember if he spoke to her. (Carr is the beneficiary of a deed of trust recorded against the Guignet-Avery property to secure a $65,000 obligation.)

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[9] Carr told the officer that he and Fjaeran were previously married. They divorced in 1978. At the time the residence was searched, the two were living together.

Carr was asked about the deeds of trust pertaining to the subject properties. Carr said that Alvin had borrowed large sums of money to purchase the properties. Carr said that Cox owed him $300,000 to $500,000. Carr told the officer that he understood that the deeds of trust would give him a priority position with respect to any excess proceeds.

Fjaeran told the police officer that she had been buying property at tax sales in San Bernardino for "years and years," including during 2004, but could not remember if she bid on the Sampson property. When asked if she ever made claims for excess proceeds on property she bid on, she responded, "I have nothing . . . to do with excess proceeds." Fjaeran told the officer that she was aware that Alvin and Justin were in the business of acquiring tax delinquent properties. She said she owned two or three properties with Alvin, and that Alvin borrowed money from her to purchase tax delinquent properties in San Bernardino. One debt, for $75,000, was repaid.

During the search of the Fjaeran and Carr residence, police recovered a writing dated March 21, 2005 (one year after the tax sales that are the subject of this case), stating, "I, Randi Fjaeran, hereby authorize John A. Carr to bid on my behalf at your tax auction today." The document is signed by Fjaeran.

During a search of the Coxes' residence in Newport Beach, police found an unsigned quitclaim deed by which Gallagher quitclaims property to Alvin.

Additional facts will be discussed below where pertinent to the issues raised in this appeal.

III. PROCEDURAL FACTS

The indictment was filed on August 1, 2005. Each of the defendants filed motions with the San Bernardino County Superior Court to dismiss each of the 27 counts of the indictment pursuant to section 995. Justin also filed a motion to dismiss pursuant to section 939.71.

A hearing on the motions was held over three days in February and April 2006. During argument, the People conceded that there was insufficient evidence to support any false representations made to the Wallens and Gallagher. After the first two days of argument, the court granted the 995 motions with respect to the theft and burglary charges. The court indicated that the totality of the circumstances shown by the evidence supported the conclusion that a false representation was made to the victims (other than the Wallens and Gallagher). In essence, the court found that the defendants falsely represented that "there is no chance of getting anything back after the tax sale and the only chance [of getting any money] is to accept their offer right now."

However, the court further found that there was insufficient evidence to support the element of detrimental reliance required for theft by false pretenses. It explained: "[I]t seems relatively clear to me that the property owners firmly believed either they had already lost the property and received nothing and were surprised to learn that they in fact had not already lost it, or realized they were about to lose it and firmly believed that they would receive nothing. And that this offer of now receiving something, was basically a gift. [¶] And that their decision to sell was based upon their own preexisting erroneous knowledge that they would receive nothing and was not induced or based upon the representations of the defendants."

With respect to the charges of filing a false or forged instrument (§ 115, subd. (a)) and forgery (§ 470, subd. (d)), the court invited further briefing and argument.

The supplemental brief filed by the People did not address the charges of filing a false or forged instrument or forgery. Instead, the People addressed the charge of conspiracy to defraud.

When the hearing reconvened, the deputy district attorney explained that the People did not address the charges of filing a false or forged instrument and forgery in their supplemental briefing because these charges are "highly tied to" the theft charges, and that further briefing on those charges was not necessary. Counsel then focused their argument on the conspiracy charge.

The court ultimately denied the section 995 motions as to the conspiracy charge against Carr, Alvin, and Justin, and granted the motions with respect to all other charges. Fjaeran's section 995 motion was granted as to all charges. The court did not rule on Carr's motion to dismiss based upon section 939.71.

IV. STANDARDS OF REVIEW

In reviewing the superior court's ruling on a motion to dismiss an indictment under section 995, we effectively disregard the ruling of the superior court and directly review the determination of the grand jury or magistrate holding the defendant to answer. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 654; *People v. Laiwa* (1983) 34 Cal.3d 711, 718.)

Under section 995, an indictment must be set aside, upon the defendant's motion, when the indictment is "without reasonable or probable cause." (§ 995, subd. (a); see *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026-1027.) "'Probable cause is shown if a man of ordinary caution or prudence could entertain a strong suspicion of guilt of the accused . . . .' [Citation.]" (*People v. Backus* (1979) 23 Cal.3d 360, 387.) The evidence required to find probable cause need not be sufficient to support a conviction. (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1147.) If there is some rational ground for assuming the possibility that an offense has been committed and that the accused is guilty of it, the indictment will not be set aside. (*Id.* at pp. 1147-1148; *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 525.)

We do not substitute our judgment as to the weight of the evidence for that of the grand jury, and draw in favor of the indictment every legitimate inference that may be drawn from the evidence. (Cf. *Williams v. Superior Court, supra,* 71 Cal.2d at p. 1148.) If there is some evidence to support the indictment, we will not inquire into its sufficiency. (*Ibid.*) Although there must be *some* showing as to the existence of each element of the charged crime, such a showing may be made by circumstantial evidence supportive of reasonable inferences on the part of the magistrate. (*Ibid.*)

Finally, the evidence received by the grand jury must "be admissible over objection at the trial of a criminal action, but the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." (§ 939.6, subd. (b).) An indictment based solely on hearsay or otherwise incompetent evidence is unauthorized and must be set aside on motion under section 995. (*People v. Backus, supra,* 23 Cal.3d at p. 387.)

V. ANALYSIS

A. *Counts in Issue on Appeal*

The People conceded below, and state on appeal, that the theft charges arising from the Wallens and Gallagher transactions are unsupported by evidence. These are counts 19, 20, and 26. We do not, therefore, address these counts.

We next consider whether the People have waived or forfeited their claims with respect to the counts of filing a false or forged instrument (section 115 counts) and forgery.[10] In the trial court, the People's initial opposition papers did not directly address arguments concerning these counts. The first two days of argument on the motions were focused entirely upon the theft charges. After the court concluded that the theft charges would be dismissed, the burglary counts, section 115 counts, and forgery counts were addressed. With respect to the burglary charges, the deputy district attorney asserted that "they hinge entirely on whether or not there's theft by false pretenses." The court agreed, and ruled that the burglary counts were therefore unsustainable.

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[10] Section 115, subdivision (a) provides: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony." This section "was designed to prevent the recordation of spurious documents knowingly offered for record." (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 681-682.)

The forgery counts are based upon section 470, subdivision (d). This section and subdivision make it a crime to, with the intent to defraud, falsely make, alter, forge, and pass as true and genuine certain enumerated documents, including any instrument conveying real estate. The crime also includes fraudulently falsifying the acknowledgement of a notary public and the counterfeiting or forging of the seal or handwriting of another.

The deputy district attorney then asserted that the section 115 and forgery counts "are in part related [to the theft charges] because they're part of the same scheme. But they're separate, distinct events with separate and distinct evidence that applies to each." The People were then given an opportunity to brief the issues concerning the section 115 and forgery charges (and the defendants were given an opportunity to respond). The People did not do so. Instead, they used the opportunity to brief the court regarding the conspiracy charge.

When the court questioned the deputy district attorney about his position on the section 115 and forgery counts, he explained only that he believed such counts were "highly tied to" the theft counts. No argument or authority pertaining to such counts were submitted.

The court granted the defendants' motions with respect to all counts, with the exception of the conspiracy count as to Alvin, Justin, and Carr. On appeal, the People present no argument with respect to the section 115 and forgery counts. Although these counts are related to the theft charges in the sense that they all arise out of the same transactions, they are, as the deputy district attorney initially argued, separate and distinct events supported, at least in part, by different evidence. Moreover, there is nothing in the trial court's ruling regarding the theft charges that necessarily precluded a finding that there was probable cause for the section 115 and forgery counts. That is, even if the theft charges could not be sustained because the victims did not detrimentally rely upon the defendants' false representations, the allegedly falsified and forged documents might still support the section 115 and forgery charges. Therefore, because the People did not present any argument or authority either below or in their briefs on appeal concerning these charges, we find that they have waived or forfeited such issues on appeal. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [failure to assert issue in trial court constitutes waiver or forfeiture of claim on appeal]; *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 808 ["An argument not raised in the briefs is waived"].) On this basis, we hold that the motions to dismiss were properly granted as to counts 5, 7, 9, 10, 11, 15, 16, 18, 22, 24, 25, and 27.[11]

B. *Probable Cause to Support Counts for Theft, Theft from an Elder, and Burglary Counts*

1. Applicable Legal Principles

(a) **Theft by False Pretense**

The defendants are charged with grand theft. The crime of theft, as it is statutorily defined in California, encompasses larceny, embezzlement, larceny by trick, and theft by false pretenses.[12] (*People v. Shannon* (1998) 66 Cal.App.4th 649, 653.) In this case, the People's theory of the crime is theft by false pretenses. "'A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation. [Citations.]'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440-1441; see also *Perry v. Superior Court* (1962) 57 Cal.2d 276, 282-283.) When the value of the money or property taken is valued at more than $400, the crime is grand theft. (§ 487, subd. (a).)

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[11] Although the lack of argument and authority in the People's opening brief with respect to the burglary charges arguably warrants a similar finding of waiver or forfeiture regarding such counts, the defendants do not assert that such a waiver or forfeiture occurred, and we find that the relevant issues are sufficiently raised for us to address these claims on the merits.

Ordinarily, the false representation must be of a past or present fact. (See generally 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 49, p. 79.) An expression of a belief or opinion, however, may constitute a fraudulent misrepresentation if stated with the purpose of deceiving another. (*People v. Gordon* (1945) 71 Cal.App.2d 606, 626; *People v. Webb* (1999) 74 Cal.App.4th 688, 694.) This is particularly so when the party expressing a belief or opinion about property has superior knowledge about the property and asserts or implies such knowledge to the other party who has not had an equal opportunity to obtain such knowledge. (*People v. Gordon*, *supra*, at p. 626; *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 153.)

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[12] Section 484, subdivision (a), defines theft: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft."

"The false pretense may consist in any act, word, symbol, or token calculated and intended to deceive. It may be either express or implied from words or conduct. [Citations.]" (*People v. Randone* (1973) 32 Cal.App.3d 164, 174.) "[T]he form of the words in which the pretense is couched is immaterial; if the words or conduct are intended to create the impression that defendant is making a representation as to a present fact, the pretense is within the statute." (*People v. Brady* (1969) 275 Cal.App.2d 984, 996.)

The "'intent to defraud is a question of fact to be determined from all the facts and circumstances of the case. [Citations.] It may be, and usually must be, inferred circumstantially.'" (*Perry v. Superior Court, supra,* 57 Cal.2d at p. 285.)

Reliance on a false representation means that it ""materially influenced" the owner's decision to part with his property; it need not be the sole factor motivating the transfer. [Citation.] A victim does not rely on a false representation if "there is no causal connection shown between the [representations] alleged to be false" and the transfer of property. [Citations.] Thus, if the defendant makes both true and false statements to the owner, but the false statements are irrelevant to the owner's decision to transfer the property, theft on the theory of false pretense has not been committed. [Citation.] Reliance may be inferred from all the circumstances.

[Citation.]' [Citation.]" (*People v. Miller, supra,* 81 Cal.App.4th at pp. 1440-1441.)

The victim of the fraud must be induced to actually part with money or property. (2 Witkin & Epstein, Cal. Criminal Law, *supra,* § 58, p. 88.) However, proof of financial loss by the victim is not required. (*People v. Randono, supra,* 32 Cal.App.3d at p. 173; *People v. Bryant* (1898) 119 Cal. 595, 597-598.) It is immaterial that the defendant gave the victim money or property of the same value as the property transferred to the defendant; what matters is that the victim was induced by false representations, made with intent to defraud, to part with something of value. (*People v. Conlon* (1962) 207 Cal.App.2d 86, 93-94; *People v. Pugh* (1955) 137 Cal.App.2d 226, 232-233; *People v. Raines* (1944) 66 Cal.App.2d 960, 962-963.) Nor is it a defense that the victim subsequently recovered the property taken. (*People v. Brady, supra,* 275 Cal.App.2d at p. 995.) "[T]he offense is complete when the property is obtained by the use of false means and is not purged by subsequent restoration, restitution or repayment." (*People v. Hand* (1932) 127 Cal.App. 484, 487.) Finally, it is unnecessary to show that the defendant benefited personally from the fraudulent acquisition. (*People v. Ashley* (1954) 42 Cal.2d 246, 259.)

(b) Theft from an Elder

Defendants are charged with three counts of theft from an elder under section 368, subdivision (d). This section and subdivision make it a crime for a person who is not a caretaker of the victim to commit, among other crimes, theft with respect to the property of an elder when the perpetrator knows or reasonably should know that the victim is an elder. (§ 368, subd. (d).) An "elder" is a person who is 65 years of age or older. (§ 368, subd. (g).)

(c) Burglary

Defendants are charged with three counts of burglary under section 459. This section provides: "Every person who enters any house, room, apartment, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." The crime is committed even if the entry into the house or other structure is with the consent of the person in possession of the property, so long as the property possessor is either unaware of, or does not endorse, the visitor's felonious intent. (*People v. Frye* (1998) 18 Cal.4th 894, 954; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1484.) Here, there is no evidence that any of the alleged victims who allowed a defendant into their house was aware of any felonious intent held by such defendant. Thus, if there is evidence to support probable cause that a defendant entered a victim's house with the intent to commit theft, there is evidence to support the charge of burglary as well.

2. Application of Legal Principles to Evidence Presented to Grand Jury

(a) The Guignet-Avery Transaction

By the time Justin and Alvin contacted Guignet and Avery, the bids for the Guignet-Avery property had exceeded $22,000—well in excess of the approximately $8,328 owed for taxes and costs of sale. Back Bays Trust, which was controlled by Alvin, would eventually bid more than $75,000 for the property. A fact finder could reasonable infer from evidence of Alvin's involvement with San Bernardino County tax sales that they were aware of the latest bids on the property. Nevertheless, Justin and Alvin told Guignet and Avery that they would "get nothing" from the sale, that the $2,500 offered was all they would get, and that they would be "out everything" if they did not accept the offer.

The representation that Guignet and Avery would get nothing from the sale could be interpreted in two ways. First, the language could be interpreted as a statement that proceeds from a tax sale are necessarily unavailable to the owners of the property sold at the sale; that is, the law does not permit the payment of proceeds to the owner. Second, it could be interpreted as an expression that although obtaining money from the sale is not necessarily impossible or legally prohibited, in Justin's and Alvin's opinion, no excess proceeds would be recovered in this instance by the owner of the property. The first interpretation is a false representation of a present fact—the absence of any right of a property owner to recover money from a tax sale.[13] Even if, under the second interpretation, the statement is not viewed as a representation of a present or past fact, it could reasonably be understood under the circumstances as a false belief or opinion expressed for the purpose of deceiving the owners. This view is supported by the late date and apparent urgency of the need to accept the offer, the appearance through the Coxes' words and actions of their superior knowledge about tax sale consequences, and the insufficient time provided for Guignet and Avery to verify the truth of the Coxes' representations. Under either interpretation, the statements can constitute false pretenses or false representations for purposes of theft. (See *People v. Gordon, supra,* 71 Cal.App.2d at pp. 625-626.)

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[13] Prior to 1976, an owner of property sold at a tax sale could not recover excess proceeds obtained from the sale. (See *Marion Drive, LLC v. Saladino* (2006) 136 Cal.App.4th 1432, 1436-1437; *Chesney v. Gresham* (1976) 64 Cal.App.3d 120, 131.)

Defendants contend that the truth or falsity of their statement—that Guignet and Avery would receive nothing—depends upon numerous variables, such as the sum of the liens against the property, the amount of the winning bid, whether the amount of the winning bid is actually paid, and the value of valid claims submitted following the sale. If, for example, it turns out that the amount received from the winning bidder does not exceed the sum of valid lien claims against the property, the property owner would receive nothing. In that situation, defendants argue, the Coxes' statement would be true. They point out that the People failed to produce evidence of the amount of liens against the subject properties and assert that none of the defendants ever actually received any excess proceeds from their purchases.

We reject this argument. First, the argument assumes that the property that was stolen was the excess proceeds from the sale. (The assumption is understandable in light of the People's theory of the case. As the People assert in their brief on appeal, "the theft was of the excess proceeds resulting from the tax sale of the real property.") Although the ultimate purpose of the alleged fraud may have been to obtain any excess proceeds payable to the owner following the sale of the property and the claims process, Guignet and Avery did not transfer any property interest in excess proceeds to any defendant. Indeed, the right, if any, to excess proceeds does not vest in the owner of the property until the date of the tax sale, that is, after title to the property has been transferred to a defendant. (See *Marion Drive, LLC v. Saladino, supra,* 136 Cal.App.4th at p. 1438 [the right to recover excess proceeds vests as of the date of the tax sale].) If a theft took place, the theft was of the real property itself. This occurred when Guignet and Avery executed the deed to their Apple Valley land. Evidence of liens against the property or of actual excess proceeds is irrelevant to the question of whether the defendants' representation was false.

Second, although it was possible, at the time the representation was made, that Guignet and Avery would not receive any proceeds from the sale, it was also possible that they would receive something from the sale. Because the sale had not yet been completed and the winning bid was uncertain, such possibility existed regardless of the amount of liens against the property; that is, regardless of the sum of liens, the price paid at the auction could possibly exceed such amount. If the Coxes told Guignet and Avery that they *might not* get anything from the sale, or that they would get nothing if the winning bid did not exceed the sum of the taxes and liens against the property, then it would appear that no misrepresentation was made. However, according to Avery, the Coxes told them that they *will get nothing.*[14] Stated in this manner, without qualification, the unambiguous message is that there was no possibility of receiving something. Such a statement, in the context presented here, constituted a false pretense.

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[14] The testimony of Guignet and Avery was somewhat in conflict on this critical point. Avery testified that Justin told him that he would "get nothing" from the sale. Guignet, however, stated that "they convinced us that [$2,500] is all we were going to get, that we *probably* wouldn't get anything." (Italics added.) Because Avery's testimony is sufficient to support the grand jury's determination on the theft count arising from this transaction, we do not decide whether

Reliance on the Coxes' false pretenses is evidenced by Guignet's testimony that she agreed to sell the property because the Coxes convinced them that the $2,500 they offered was all they would get, and by Avery's testimony that he agreed to sell because Justin told them they would get nothing from the sale. Based upon Justin's false statements, they felt they had "no choice" but to accept the offer, and so they did. There is no evidence to suggest that Guignet and Avery would have sold the property to Alvin in the absence of the false pretenses or regardless of the possibility of receiving something from the sale.

In sum, the evidence presented to the grand jury was sufficient to provide probable cause that the Coxes, with the intent to defraud, made knowingly false representations to Guignet and Avery, and that Guignet and Avery transferred title to the property in reliance on such misrepresentations. That is enough to support the charge of grand theft (count 3).

Guignet was approximately 80 years old at the time of the transaction. Alvin met with her in person. Therefore, because there is probable cause to support the count for theft, there is probable cause to support the count for theft from an elder (count 2).

The misrepresentations made by Justin before Alvin's entry into the Guignet-Avery residence, and Alvin's misrepresentations made after his entry,

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Guignet's testimony might require a different result if her testimony was the only evidence offered.

support a reasonable suspicion that Alvin entered the home with the intent to commit theft by false pretenses. The evidence thus provides probable cause to support the count of burglary (count 4).

(b) **The Berman Transaction**

After the bids on the Bermans' property had greatly exceeded the amount of taxes owed on the property, Justin called Mr. Berman and told him that he wanted to buy the property that day. He explained to Mr. Berman that the property would be sold the next day and taken over by the county, and that the Bermans would receive nothing. Alvin met with the Bermans in their driveway and told Mrs. Berman that the property had no value and he was doing them a favor by giving them $750 for it.

The representation that the Bermans would receive nothing from the sale expressed either a false representation of present fact or a fraudulent opinion or belief asserted in bad faith for the reasons discussed above as to the statements made to Guignet and Avery. Although defendants did not have an obligation to explain to the Bermans the possibility of obtaining money from excess proceeds, they did have a duty to avoid making affirmative false representations. If, for example, a defendant simply approached the Bermans and offered to purchase their Devore property for $750, and said nothing more, there would be no false representation to support a claim for theft. This is so even though the Bermans would have lost the right to claim excess proceeds by accepting the offer and deeding the property to the defendant prior to the sale. Here, however, Justin said something more—that the property would be sold and the Bermans would "get no money from it and that would be it." In light of the circumstances surrounding this representation, there is probable cause to find that it constitutes a false pretense or false representation.

There is, however, insufficient evidence to establish probable cause that the Bermans relied upon the Coxes' false pretenses. Mr. Berman said knowledge about excess proceeds would have been important to him in deciding whether to accept Alvin's offer. This evidence, however, would have been relevant if the defendants had an obligation to inform the Bermans about the excess proceeds, which they did not. The relevant question is whether the Bermans would have sold the property to Alvin for $750 if Justin had simply offered to buy the property without telling them that they would not get any money from the sale. If the answer to that question is yes, then the misrepresentation did not materially influence the decision to part with the property; if the answer is no, then the misrepresentation was at least a motivating factor in the decision to sell. Here, the Bermans were never asked this question. Nor is there other evidence that raises the requisite suspicion of material reliance upon the misrepresentation. Indeed, unlike Guignet and Avery, the Bermans were aware that their Devore property was scheduled for a tax sale in May 2004, and wanted "to get rid of" it. Mr. Berman's testimony reveals a lack of concern, if not relief, that the property would be sold at the tax sale. The evidence suggests that he would have agreed to sell the property for any amount regardless of whether he was told that he would receive nothing at the sale.

Because there is no evidence establishing probable cause of reliance by the Bermans on

Justin's false representations, count 6 of the indictment cannot stand.

(c) The Sampson Transaction

After the bidding on Sampson's property had reached approximately $10,000 above the amount of taxes owed on the property, Justin called Sampson and told her of the sale, that she had lost the property, and that Carr wanted to buy it. Carr then met with Sampson in her house and told her that he wanted to buy the property because it would make him "the first bidder" at the sale, and "give him the first option to purchase the property when it went up for sale." According to Sampson, Carr also "alluded to wanting to build a house for his mother or do something like that with the land." Carr pulled $7,000 out of his pocket and offered it to Sampson in exchange for signing a deed to him "and letting him be the first bidder to purchase the property." There was no evidence that either Justin or Carr told Sampson anything to the effect that she would not receive any money from the sale.

Justin's statements to Sampson were not false. Because Sampson could no longer redeem the property by paying the unpaid taxes, it was true that she had effectively "lost" the property.

Carr did make false statements—holding title to the property would not give Carr any advantage in bidding on the property or provide him with an option to purchase the property. Moreover, because buying the property just prior to the tax sale would make him the owner only until the sale occurred (i.e., the next day), his expressed desire to use the land to build a house for his mother was also false.

But there is no direct evidence, or any evidence from which to infer, that Carr's false statements induced Sampson to sell her property or that Sampson would not have sold the property if Carr did not make these statements. Sampson did not testify that she sold the property to Carr because she wanted to either give him the bidding advantage that Carr ostensibly sought or to help him acquire land for a home for his mother. Indeed, the only reasonable inferences to draw from her testimony is that she treated the offer from Carr as an unexpected windfall. Justin and Carr seemingly appeared out of nowhere to give her $7,000 for property that she believed she did not own. Under the circumstances described by Sampson, the only reasonable conclusion that can be drawn is that Sampson would have accepted the offer regardless of whether Carr told her his false reasons for wanting the property. She did not, therefore, materially rely upon Carr's false statements in deciding to part with her property. Accordingly, count 8 for grand theft should be dismissed.

Although the evidence is insufficient to establish probable cause that Sampson relied upon Carr's false representations, the evidence of Carr's entry into the house and his false statements in connection with his efforts to obtain Sampson's property constitute probable cause that he committed burglary. "Any person who enters a house or building with the intent to commit a felony or theft is guilty of burglary." (*People v. Frye, supra,* 18 Cal.4th at p. 954.) "If the necessary intent exists at the time of entry, the crime of burglary is committed. It is immaterial whether the intended theft . . . is accomplished; i.e., neither impossibility of achievement of the intended purpose, nor abandonment of that purpose, is a defense." (2

Witkin & Epstein, Cal. Criminal Law, *supra,* § 128, p. 159.) Carr's entry and false representations to Sampson about his reasons for seeking the property would cause a man of ordinary caution or prudence to entertain a strong suspicion that Carr entered Sampson's house with the intent to commit theft. Probable cause therefore exists to support the burglary count pertaining to the Sampson transaction (count 12).

(d) The Wallen Transaction

As discussed above, the theft counts against Wallen (counts 19 & 20) were abandoned during the trial court proceedings and the court's ruling on those counts are not challenged on appeal. As also discussed above, any challenge to the section 115 count has been waived or forfeited by the People. However, the People continue to pursue the burglary charge arising from the Wallen transaction.

Here, Alvin entered the Wallens' residence with the intent to purchase the Wallens' two-foot strip of land. Unlike the evidence supporting the Sampson burglary count, there is no evidence in the record that Alvin entered the Wallens' house with the intent to commit theft by false pretenses or any other felony. Neither the caller (presumably Justin) who set up the meeting with the Wallens nor Alvin made any false representation to the Wallens. One can commit burglary by entering a house with the intent to obtain property by false pretenses even though, after gaining entry, the property is obtained without resorting to the use of false pretenses. However, that such a scenario occurred here is mere speculation. There being no direct or circumstantial evidence to support an inference of the intent element of burglary, count 21 of the indictment cannot be sustained.

(e) The Watts Transaction

Watts knew of the pending tax sale of his eight vacant lots before he was contacted by any defendant. Shortly before the sale, Justin called Watts and offered to get Watts some money for the lots before he "lost them." When asked by the deputy district attorney whether Justin indicated to him "whether this would be the only money that [Watts] would get" for the lots, Watts said, "I think from what he said by saying that I can get you some money before they are lost and sold at the auction, either he said it or I assume that meant obviously I would get nothing." Watts also agreed with the following summary posed by the deputy district attorney: "So you were under the belief based on your conversation with [Justin] that you either got the money from Mr. Cox or if the properties went to . . . the tax auction, you would get nothing."

This evidence of a false representation by Justin is minimal. If Justin merely told Watts that he was about to lose the lots at the tax sale and offered to buy them, no false representation occurred. If, however, Justin also said that Watts would not receive any other money from the tax sale, he did make a misrepresentation for the reasons discussed above. Whether he crossed this line is unclear from Watts's testimony: Maybe Justin said he would receive nothing from the sale, or maybe Watts just assumed it.

Our analysis is guided by the People's relatively low burden at this stage of the proceedings and the evidence of misrepresentations made by Justin during the other transactions during the same time period. The People must only show that probable cause exists to sustain the charge against a challenge under section 995. That is, that "a man of ordinary caution or prudence could entertain a strong suspicion of guilt of the accused." (*People v. Backus, supra,* 23 Cal.3d at p. 387.) The evidence need not be sufficient to support a conviction. (*Williams v. Superior Court, supra,* 71 Cal.2d at p. 1147.) Although this burden might not be satisfied if the Watts transaction were the only transaction in which Justin allegedly made false statements, there is evidence that around the same time he made misrepresentations concerning the right to receive money following the tax sale to, at least, Avery, Berman, and Guggiana (as discussed below). When Watts's uncertain testimony is viewed in the light of these misrepresentations to others made around the same time, a man of ordinary caution or prudence could entertain a strong suspicion that Watts's belief that he would get nothing from the sale was based on misrepresentations asserted by Justin.

Assuming that Justin made the misrepresentation, Watts's reliance on such representation in selling the lots to Alvin can be inferred from the circumstances. When Watts was asked why he agreed to sell the lots, he said that he "needed money," and "[b]etter some than nothing." The choice considered by Watts, however, should not have been between "some" and "nothing," but between some (the money offered by Justin) and the possible receipt of something (excess proceeds) from the sale. If Watts was not misled about the possibility of receiving some money from the tax sale, he may well have decided not to sell to the Coxes (or at least not for the price offered) and take his chances on recovering excess proceeds.

In addition, unlike Berman (who wanted to "get rid" of his property), there is evidence that Watts was not willing to give up his properties for whatever price Justin offered. Watts testified that when he met with Justin and Alvin, and Justin lowered his offer for the lots, Watts told him: "Look. I don't plan to stay here and be jerked around. I am getting out of here." When he started getting ready to leave, Justin told him that they would pay the price previously offered. This suggests that Watts might have negotiated a better deal, or decided to forego a deal at all, if he had not been misled into believing that he would get nothing after the sale. Under these circumstances, there is probable cause that Justin's misrepresentations materially influenced Watts's decision to part with his eight lots.

The deed signed by Watts states that he "hereby assigns all rights, titles and interest in any excess proceeds resulting from the sale of said property."[15] (Watts testified that he did not read this language on the deed.) This language tends to undercut the People's case with respect to both the existence of a fraudulent misrepresentation (Justin would not have made a misrepresentation about the possibility of excess proceeds when the deed itself implies such a possibility) or reliance (Watts could not reasonably have relied upon Justin's oral misrepresentation about getting nothing from the sale when the written document impliedly discloses a right to excess proceeds). Although the language on the deed is relevant, it does not necessarily preclude the grand jury's finding of probable cause.

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[15] Such language could have no legal effect because the right to excess proceeds, if any, does not vest until the sale of the property. (See *Marion Drive, LLC v. Saladino, supra,* 136 Cal.App.4th at p. 1438.) At the time the deed was signed, the sale had not occurred. Watts therefore did not have any right, title, or interest in excess proceeds at the time he purportedly made the assignment.

Because there is enough evidence to satisfy the probable cause standard of a misrepresentation and material reliance, as well as the transfer of property worth more than $400, the defendants can be held on the charge of grand theft (count 14). Because Watts was over 65 years old at the time of the transaction, and the Coxes, having met with him in person, should have reasonably known he was elderly, there is also probable cause for the charge of theft of an elder (count 13).

(f) The DeGraffenreid Transaction

DeGraffenreid was aware of the pending tax sale of his property in Chino. Justin called him the day before the property was to be sold at the May 2004 tax auction and asked if DeGraffenreid wanted to sell the property. DeGraffenreid said, "sure," because he "was just going to let it go anyway" at the tax sale. DeGraffenreid gave seemingly conflicting testimony about Justin's statements concerning the possibility of receiving money after the tax sale. He told the grand jury that Justin offered him money "instead of letting [the property] go for tax sale." The following exchange with the deputy district attorney then took place:

"Q. What did you think that meant to you?
"A. Oh, that I wasn't going to get anything.
"Q. Okay.

"A. If it went for tax sale, I wasn't going to get anything.

"Q. Did you and he discuss that, that you wouldn't get anything if he didn't—if you didn't take his $25,000 offer?

"A. Well, no. No.

"Q. That is just what you believed?

"A. Yes."

If acceptance of Justin's offer was merely presented as an alternative to "letting the property go" at the sale, we would find no evidence of a material misrepresentation; DeGraffenreid's title to the Chino property would indeed be extinguished, or "let go." DeGraffenreid's belief that he would not get anything from the sale (as well as lose title to the property) appears from this testimony to be based upon something other than Justin's statements.

However, later in the examination, the following exchange took place:

"Q. Did [Justin] tell you what was going to happen to your property if you didn't take his money?

"A. I wouldn't get anything.

"Q. Are those his words?

"A. Yes."

If Justin told DeGraffenreid that he would not get anything if the property was sold at the tax sale, he made a misrepresentation for the reasons explained in our discussion of the Guignet-Avery transaction. If jurors are presented with the same conflicting testimony, they may well decide that the prosecution failed to establish a fraudulent misrepresentation beyond a reasonable doubt. As with the Watts transaction, however, the People's burden at this stage of the case plays a critical role in our analysis. Under the applicable standards, the second excerpt of testimony provides enough evidence to support the strong suspicion of guilt and establish probable cause as to the false representation element of theft.

Nevertheless, we find insufficient evidence in the record to establish probable cause that DeGraffenreid relied upon any misrepresentation. DeGraffenreid was asked by the deputy district attorney if it would have mattered to him to know that there was a possibility of obtaining excess proceeds from the sale. DeGraffenreid said it would have mattered to him because he "would have figured that probably the property is worth more than what [he] let him have it for." As explained in the discussion regarding the Berman transaction, however, this is the wrong question. Justin had no duty to tell DeGraffenreid about excess proceeds. He did have a duty to not falsely represent that DeGraffenreid would not get anything from the sale (when, in fact, he might get something). The relevant question is whether it would have mattered to DeGraffenreid if Justin had refrained from telling him that he would not get anything from the sale. This question was not asked, and (in contrast to the Watts transaction) there is no other evidence from which we can infer that DeGraffenreid would not have sold the property to Alvin if Justin had remained silent on that point. The theft count pertaining to the DeGraffenreid transaction (count 17) must therefore be dismissed.

(g) The Guggiana Transaction

A man with a "J name," which the grand jury could reasonably infer was Justin, spoke to Mr. Guggiana. The caller told Mr. Guggiana that he was calling on behalf of land speculators who wanted to buy property owned by Mrs. Guggiana. He explained that the property would be sold the next day and that "they" wanted to buy the property before the sale to avoid a bidding war and to have more control over the bidding. Mr. Guggiana responded by telling the caller that a bidding war was fine with him because it meant more money from the sale. The caller then told him, "No. It doesn't work that way. All proceeds above the price of the . . . taxes that are due and the fees and assessments go straight to the state. You will not receive anything." Mr. Guggiana told the caller, "Are you sure of that? That doesn't sound right." The caller explained: "No, because you passed your date to file to stop the proceedings. If you had contacted them prior to the date that they had given you, . . . you could have got something. But now that you passed it, you lose everything. So probably be best to get something out of it than nothing at all." It was too late for Mr. Guggiana to verify the caller's story. To Mr. Guggiana, the caller sounded knowledgeable and more informed than he. Mrs. Guggiana deferred to her husband to make the decision whether to sell the property. Mr. Guggiana decided to accept it because, as he told the grand jury, "better something than nothing."

These facts easily establish probable cause for theft. Prior to speaking with Justin, Mr. Guggiana believed that sale proceeds above the amount owed for taxes would be given to the property owner. The caller affirmatively, unambiguously, and falsely represented to Mr. Guggiana that all excess proceeds from the sale would go to the state, and that the Guggianas would receive nothing. The evidence of the conversation also shows that the Guggianas believed the false representations and would not have accepted the caller's offer if the representations had not been made. Once Mr. Guggiana's belief that they could recover excess proceeds was dispelled by the more knowledgeable caller, he felt he must accept the offer because it was better than nothing. There is thus probable cause for the theft count arising from the Guggiana transaction (count 23).

C. *Fjaeran's Participation in the Conspiracy*

The trial court ruled that the evidence before the grand jury established probable cause for the conspiracy alleged in count 1 of the indictment as to Justin, Alvin, and Carr. That ruling is not a subject of our review at this stage in the proceedings. The object of the alleged conspiracy was, in essence, to acquire property subject to pending tax sales by false pretenses in order to obtain any excess proceeds after the sales. The issue presented by the People's appeal is whether the evidence establishes probable cause that Fjaeran was part of that conspiracy. We hold that it does.

Section 182 makes it a crime to conspire with another to "cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses . . . ," together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance thereof. (§§ 182, subd. (a)(4), 184; *People v. Swain* (1996) 12 Cal.4th 593, 600.) "Circumstantial evidence often is the only means to prove conspiracy. [Citations.] There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime."

(*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999.) "The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 311.)

Fjaeran was the grantee of the Sampson property, which was acquired by the direct efforts of Justin and Carr. As such, she appeared to be in a position to claim up to $65,000 of excess proceeds for that property. After obtaining title to the Sampson property, Fjaeran thereafter engaged in a two-person online bidding war for the property, effectively increasing the amount of the excess proceeds that she would receive from the high bidder. Although bidding for the property, by itself, is not improper, such bidding, immediately after acquiring the deed from Sampson, is consistent with the People's theory that the purpose of the conspiracy was to obtain excess proceeds; the larger the amount of excess proceeds, the more money for the conspiracy participants. Fjaeran's bidding conduct certainly advanced this goal and appears to be otherwise inexplicable: If Fjaeran intended to actually purchase the property at the auction, there would be no point in acquiring the property from Sampson beforehand; Fjaeran would simply make the highest bid and obtain the deed from the tax collector. The combination of Carr's last minute acquisition of title from Sampson and the subsequent bidding activity strongly suggests that Fjaeran acquired title to the Sampson property, through the efforts of her compatriots, and sought to increase the amount of excess proceeds by bidding up the property. Such conduct supports an inference that she is a participant in the conspiracy.[16]

In addition to her involvement in the Sampson transaction, Fjaeran apparently acted as a lender to Alvin and was in a position, as the beneficiary of a deed of trust, to receive the excess proceeds on the sale of properties formerly belonging to Watts. It is possible that Fjaeran merely acted as financier of the transaction. However, the amount purportedly secured by the deed of trust far exceeds the amount paid by Alvin for the Watts properties. While Alvin paid $10,000 to buy Watts's eight properties, the deed of trust from Alvin to Fjaeran purports to secure a $140,000 debt. Fjaeran would thus receive up to $140,000 of excess proceeds ahead of Alvin, the new owner of the properties. Even if the purported obligation is legitimate, Alvin's grant to Fjaeran of a superior position with respect to the recovery of fraudulently obtained profits strongly suggests that her role is something more than the conspirators' banker.

Fjaeran was also involved in the DeGraffenreid transaction. Both she and Carr bid for the property after Justin obtained title to the property (in Alvin's name). Although Carr made the highest bid, he did not pay for the property. Such conduct suggests that neither Carr nor Fjaeran had any intention of purchasing the property by their bids and merely sought to increase the amount of excess proceeds available to Carr (as the beneficiary of a deed of trust on the property) and Alvin (the owner). Again, while bidding on the property to increase the amount of excess proceeds is not a crime, the bidding activity by Fjaeran on property that is the object of a conspiracy, together with other evidence of the relationship with, and the activities of, the other defendants, is circumstantial evidence that she was a part of the conspiracy.

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[16] Although we conclude above that there is insufficient evidence to establish probable cause that Sampson relied upon Carr's false representations when she deeded the property to Fjaeran, evidence of the Sampson transaction is nevertheless relevant to show an overt act in furtherance of the conspiracy, and her involvement in that transaction is relevant to show that Fjaeran was a participant in the conspiracy.

Based upon such facts, we find that the evidence submitted to the grand jury provides probable cause to indict Fjaeran on the conspiracy charge. Because the remaining charges are allegedly acts committed by the coconspirators in furtherance of the conspiracy, Fjaeran is also properly charged with the crimes for which probable cause has been established.

VI. DISPOSITION

The orders granting Fjaeran's section 995 motion in its entirety, and granting in part and denying in part Justin's, Alvin's, and Carr's section 995 motions, are reversed. The court is directed to enter a new order granting each of the section 995 motions as to counts 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, and 27, and denying each motion as to counts 1, 2, 3, 4, 12, 13, 14, and 23.

APPENDIX C

IN THE CASE OF
THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff

V.

JOHN CARR et al.,
Defendants

Case No. FSB51477
(Super.Ct.No.)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO

CENTRAL DISTRICT - DEPT. S19

THE HONORABLE JUDGE MICHAEL A. SMITH PRESIDING. COURT CLERK: EVI ROBERSON. REPORTED BY THERESA WOLF, CSR.

Minute Order Dated 4/7/06 re: Cal. Pen. Code 995 Motion to Dismiss

ACTION CAME ON FOR FURTHER HEARING RE: 995 PC MOTION.

THE COURT REVIEWS THE STATUS OF THE ISSUES AND INDICATES THAT HE HAS READ THE POINTS AND AUTHORITIES SUBMITTED.

TENTATIVE RULING: THE COURT INDICATES THAT HE IS INCLINED TO GRANT THE 995 PC MOTION AS TO THE FOLLOWING CHARGES: FORGERY (470 PC); ATTEMPT TO FILE FALSE OR FORGE INSTRUMENT (115 PC); AND BURGLARY (459 PC) AS TO EACH DEFENDANT.

COUNSEL PRESENT THEIR RESPECTIVE ARGUMENTS.

THE COURT ADVISES CO-DEFENDANT FJAERAN'S COUNSEL THAT HE INTENDS TO GRANT THE 995 PC MOTION IN IT ENTIRETY AS TO HIS CLIENT.

COUNSEL PRESENT FURTHER ARGUMENT. THEREAFTER THE COURT MAKES THE FOLLOWING RULING: 995 PC MOTION DENIED AS TO THE CHARGES OF CONSPIRACY (182(A)(4) PC).

DISMISSALS

ON MOTION OF DEFENSE COUNSEL, COUNT(S) 2-27 DISMISSED IN THE INTEREST OF JUSTICE. MOTION TO REDUCE CHARGES TO A MISDEMEANOR BY DEFENSE COUNSEL IS DENIED.

MR HARMON'S MOTION TO STRIKE CARL WALLEN'S NAME A TO COUNTS 19 THROUGH 22 RE NO FALSE REPRESENTA- TIONS MADE IS DENIED.

MR HARMON'S MOTION TO REDUCE BAIL IS GRANTED. BAIL REDUCED TO $250000.00 AS TO EACH DEFENDANT.

MR GERAGOS ADVISES THE COURT THAT HE ANTICIPATES FILING A MOTION PURSUANT TO 186.11 PC.

TIME WAIVERS

DEFENDANT WAIVES TIME TO 05/26/2006 PLUS 120 DAYS.

TIME WAIVED TO 09/25/2006.

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HEARINGS

HEARING ON MOTION(S) AND

DEFENDANT ORDERED TO APPEAR ON HEARING DATE.

-

CUSTODY STATUS

CASE CUSTODY - PROPERTY BOND

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

GRAND JURY 2005

The 1st Day of August, 2005

The People of the State of California,
Court Case No. FSBO51477
Plaintiff
GRAND JURY INDICTMENT
John Allen Carr,
Randi Fjaeran,
Alvin Cox,
Justin Cox, Defendants DA
Case No. 2005-00-0013775

THE GRAND JURY OF THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, CHARGES:

COUNT 1

On or about May 1, 2004 through January 31, 2005, in the above named judicial district, the crime of CONSPIRACY TO DEFRAUD ANOTHER OF PROPERTY, in violation of Penal Code section 182(a)(4), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully conspire together, and with another person and persons whose identity is unknown, to cheat and defraud owners of real property located in San Bernardino County including Betty Guignet, Anderw Berman, Kimothy Sampson, Emmet D. Watts, James De Graffenreid, Carl Wallen, and Shari Guggiana, of property by means which are criminal and obtain money and property by false pretense and by false promises with fraudulent intent not to perform such promises; that pursuant to and for the purpose of carrying out the objects and purposes of the aforesaid conspiracy the said defendants committed the following overt act and acts and in the County of San Bernardino:

1. Contacted owners of real property located in San Bernardino County who were delinquent in the payment of property taxes due on their parcels and whose property was scheduled to be sold at auction by the San Bernardino Tax Collector.
2. Told each of the owners of such real property that the owner's interest in the property was already "lost" and that the property was due to be sold at auction the next day.
3. Falsely represented to the owners that the owners would be entitled to "nothing" as a result of the pending sale at auction.
4. Offered each of the owners a sum of money, substantially smaller than the real value of the property, for a transfer of their interest in the property.
5. Told each of the owners that the offered sum was all they could expect to receive, and was in effect a gift since the property was lost to them anyway.
6. Obtained a deed from the owners of the tax defaulted property.
7. Transferred a secured interest in the property, documented by a Deed of Trust, from one member of

the conspiracy to another to create a "secured lien" in the property.

8. Recorded the "Deed of Trust" in the Office of the Recorder, County of San Bernardino.

9. Bid at the auction of the property they already owned, having obtained ownership of the property by deceiving the previous owners regarding the latter's rights to the property.

*****

COUNT 2

On or about May 19, 2004, in the above named judicial district, the crime of THEFT FROM ELDER OF DEPENDENT ADULT, in violation of Penal Code section 368(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who committed theft, embezzlement, forgery, fraud, and identity theft with respect to the property and personal identifying information of an elder and dependent adult, said property, goods, and services taken and obtained having a value exceeding $400.00, and knew, and reasonably should have known that said person, Betty Guignet, was an elder and dependent adult.

*****

COUNT 3

On or about May 19, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hunderd Dollars ($400), to wit, money, the property of Betty Guignet.

*****

COUNT 4

On or about May 19, 2004, in the above named judicial district, the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did enter an inhabited dwelling house and trailer coach, and inhabited portion of a building occupied by Betty Guignet, with the intent to commit larceny and any felony.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c) and a violent felony within the meaning of Penal Code section 667.5(c)."
"NOTICE: Conviction of this offense will require you to provide specimens and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a crime."
"NOTICE: It is further alleged that a conviction of the above offense prohibits a grant of probation pursuant to Penal Code Section 462(a), except in unusual cases where the interest of justice would best be served if probation is granted."

*****

COUNT 5

On or about May 14, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered, and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

*****

COUNT 6

On or about May 19, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Andrew Glen Berman.

*****

COUNT 7

On or about May 19, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

*****

COUNT 8

On or about May 20, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Kimothy Sampson.

*****

COUNT 9

On or about May 20, 2004, in the above named judicial district, the crime of FORGERY, in violation of Penal Code section 470(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did, with the intent to defraud, falsely make, alter, forge, and counterfeit, utter, publish, pass and attempt to offer to pass, as true and genuine, a Grant Deed or a Deed of Trust, knowing the same to be false, altered, forged and counterfeited.

*****

COUNT 10

On or about May 20, 2004, in the above named judicial district, the crime of FORGERY, in violation of Penal Code section 470(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did, with the intent to defraud, falsely make, alter, forge, and counterfeit, utter, publish, pass and attempt to offer to pass, as true and genuine, a Grant Deed or a Deed of Trust, knowing the same to be false, altered, forged and counterfeited.

*****

COUNT 11

On or about May 20, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

*****

COUNT 12

On or about May 20, 2004, in the above named judicial district, the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did enter an inhabited dwelling house and trailer coach, and inhabited portion of a building occupied by Kimothy Sampson, with the intent to commit larceny and any felony.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c) and a violent felony within the meaning of Penal Code section 667.5(c)."

"NOTICE: Conviction of this offense will require you to provide specimens and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a crime."

"NOTICE: It is further alleged that a conviction of the above offense prohibits a grant of probation pursuant to Penal Code Section 462(a), except in unusual cases where the interest of justice would best be served if probation is granted."

*****

COUNT 13

On or about May 24, 2004, in the above named judicial district, the crime of THEFT FROM ELDER OF DEPENDENT ADULT, in violation of Penal Code section 368(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who committed theft, embezzlement, forgery, fraud, and identity theft with respect to the property and personal identifying information of an elder and dependent adult, said property, goods, and services taken and obtained having a value exceeding $400.00, and knew, and reasonably should have known that said person, Emmett D. Watts, was an elder and dependent adult.

*****

COUNT 14

On or about May 24, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Emmett D. Watts.

*****

COUNT 15

On or about May 23, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

*****

COUNT 16

On or about May 23, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

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COUNT 17

On or about May 24, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of James Paul De Graffenreid.

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COUNT 18

On or about May 24, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

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COUNT 19

On or about May 27, 2004, in the above named judicial district, the crime of THEFT FROM ELDER OF DEPENDENT ADULT, in violation of Penal Code section 368(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who committed theft, embezzlement, forgery, fraud, and identity theft with respect to the property and personal identifying information of an elder and dependent adult, said property, goods, and services taken and obtained having a value exceeding $400.00, and knew, and reasonably should have known that said person, Carl D. Wallen, was an elder and dependent adult.

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COUNT 20

On or about May 27, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Carl D. Wallen.

*****

COUNT 21

On or about May 27, 2004, in the above named judicial district, the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did enter an inhabited dwelling house and trailer coach, and inhabited portion of a building occupied by Carl D. Wallen, with the intent to commit larceny and any felony.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c) and a violent felony within the meaning of Penal Code section 667.5(c)."

"NOTICE: Conviction of this offense will require you to provide specimens and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a crime."

"NOTICE: It is further alleged that a conviction of the above offense prohibits a grant of probation pursuant to Penal Code Section 462(a), except in unusual cases where the interest of justice would best be served if probation is granted."

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COUNT 22

On or about May 27, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

*****

COUNT 23

On or about August 5, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Shari Guggiana.

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COUNT 24

On or about August 5, 2004, in the above named judicial district, the crime of FORGERY, in violation of Penal Code section 470(d), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did, with the intent to defraud, falsely make, alter, forge, and counterfeit, utter, publish, pass and attempt to offer to pass, as true and genuine, a Grant Deed or a Deed of Trust, knowing the same to be false, altered, forged and counterfeited.

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COUNT 25

On or about August 5, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

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COUNT 26

On or about May 20, 2004, in the above named judicial district, the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of Penal Code section 487(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit, money, the property of Daniel Gallagher.

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COUNT 27

On or about May 24, 2004, in the above named judicial district, the crime of ATTEMPT TO FILE FALSE OR FORGED INSTRUMENT, in violation of Penal Code section 115(a), a felony, was committed by John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, who did unlawfully and knowingly procure and offer a false and forged instrument to be filed, registered and recorded in a public office within this state, which instrument, if genuine, might be filed, registered, and recorded under a law of this state or the United States.

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It is further alleged as to counts 1 through 27, that in the commission of the above offenses the said defendants John Allen Carr, Randi Fjaeran, Alvin Cox, and Justin Cox, with the intent to do so, took, damaged and destroyed property of a value exceeding $150,000, within the meaning of Penal Code Section 12022.6(b).

It is further alleged, pursuant to Penal Code section 186.11(a), that the offenses set forth in counts 1 through 25 are related felonies, a material element of which is fraud and embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than five hundred thousand dollars ($500,000).

Pursuant to Penal Code section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code section 1054.3.

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Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

Witness Name	Agency
1. Avery, Fred	
2. Ayers, Ken	
3. Berman, Andrew	
4. Berman, Erin	

5. Couse, Colleen
6. De Graffenreid, James
7. Gallagher, Daniel
8. Guardipee, Ingrid
9. Guggiana, Paul
10. Guggiana, Shari
11. Guignet, Betty
12. Hernandez, Diana
13. Leibrich, Michael

District Attorney's Office – B of I

14. Matsuno, Tracy
15. McHenry, Sharon

SB Sheriff – Crime Lab

16. McKee, Kelly

County Tax Collector's Office

17. Meredith, Ryan
18. Moore, Walter
19. Moran, Sean
20. Rodriguez, Vanessa
21. Sampson, Kimothy
22. Wallen, Carl
23. Wallen, Hope
24. Watts, Emmett
25. Wheeler, Mark

Grand Jury Advisor:
CLARK HANSEN, JR

Deputy District Attorney

Deputy District Attorney Presenting Indictment:
Larry F. Roberts